

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

Injury No.: 07-091724

Employee: Lewis Daniels  
Employer: R & S Electric  
Insurer: Travelers Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

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. We have reviewed the evidence and considered the whole record and we find 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 Law, except as modified herein. Pursuant to section 286.090 RSMo, we issue this final award and decision affirming the December 3, 2009, award and decision of the administrative law judge. We write separately to correct clerical errors in the award. Except as set forth herein, we adopt the findings, conclusions, decision, and award of the administrative law judge.

This matter was tried with Injury No. 07-103060. The administrative law judge prepared one word processing document to create the awards in both cases. The bodies of the awards are identical. The award summaries are different. The award summary for this case, Injury No. 07-091724, appears on pages denominated Page 1 and Page 2. The award summary for Injury No. 07-103060 appears on pages denominated Page 3 and Page 4. Page 3 and Page 4 are not part of the award in the instant case. Consequently, in the instant award, page 2 is followed by page 5. No pages are missing.

On the page denominated Page 5, the caption reads "Injury No. 07-103060". We correct the caption on Page 5 to read "Injury No. 07-091724,"

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.

The award and decision of Chief Administrative Law Judge Nelson G. Allen, issued December 3, 2009, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 29<sup>th</sup> day of April 2010.

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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**SEPARATE OPINION FILED**

John J. Hickey, Member

Attest:

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Secretary

Employee: Lewis Daniels

**SEPARATE OPINION**  
**CONCURRING IN PART AND DISSENTING IN PART**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified. I agree with the majority's conclusion that employee sustained a compensable repetitive use injury. I disagree with the majority's determination regarding employee's resultant disability. I also disagree with the majority's conclusion that employee is not entitled to benefits from the Second Injury Fund.

I believe the majority's conclusion that employee sustained only 10% permanent partial disability due to his repetitive use condition is erroneous. Based upon employee's testimony regarding his pain and physical limitations and based upon the testimony of Dr. Koprivica regarding employee's physical restrictions, I believe employee sustained a 20% permanent partial disability of the body as a whole as a result of his repetitive use injury.

I agree with the majority's conclusion that employee has not proven he is permanently and totally disabled. However, as to the majority's conclusion that employee's preexisting vascular condition did not meet the statutory threshold to trigger Second Injury Fund liability for permanent partial disability, I disagree. Dr. Koprivica testified that employee's preexisting vascular condition rendered employee 25% permanently partially disabled of the body as a whole. Dr. Fevurly did not give a disability rating for the vascular condition but he twice referred to the condition as severe. I find credible Dr. Koprivica's opinion regarding employee's preexisting vascular condition. Employee's preexisting disability of 25% of the body as a whole easily meets the statutory thresholds of section 287.220.1 RSMo. Further, a review of the medical restrictions resultant from the vascular condition makes plain that the condition is a hindrance or obstacle to reemployment.

Dr. Koprivica opined that when employee's disability from his repetitive use injury is combined with the disability from his preexisting vascular condition, the resulting overall disability to employee is greater than the simple sum of the two disabilities. Dr. Koprivica believes employee's disability is enhanced 10% due to the combination of the disabilities. I would award to employee 18 weeks of enhanced permanent partial disability from the Second Injury Fund ((80 weeks + 100 weeks) X 10%).

I would modify the award of the administrative law judge as described above. For the foregoing reasons, I respectfully dissent from those portions of the majority decision with which I have expressed my disagreement.

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John J. Hickey, Member

## AWARD

Employee:               **LEWIS DANIELS**                               Injury No.   **07-091724**

Employer:               **R & S ELECTRIC**

Additional Party:       **TREASURER OF THE STATE OF MISSOURI AS CUSTODIAN  
OF THE SECOND INJURY FUND**

Insurer:               **TRAVELER'S INSURANCE COMPANY**

Hearing Date:         **SEPTEMBER 8, 2009**                               Checked by: **NGA**

### 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: **SEPTEMBER7, 2007**
5. State location where accident occurred or occupational disease was contracted: **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 WAS AN ELECTRICIAN AND HAD TO PULL WIRE AND WORK ABOVE HIS HEAD FOR LONG PERIODS OF TIME.**
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 AND BODY AS A WHOLE**

14. Nature and extent of any permanent disability: **10% 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? **NONE**

18. Employee's average weekly wages: **NOT KNOWN**

19. Weekly compensation rate: **\$742.72 / \$389.04**

20. Method wages computation: **BY STIPULATION**

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses: **N/A**

**40** weeks of permanent partial disability from Employer X **\$389.04 = \$15,561.60**

22. Second Injury Fund liability: **NONE**

**TOTAL: \$15,561.60**

23. Future requirements awarded: **NONE**

Said payments to begin **SEPTEMBER 8, 2009** and to be payable and be subject to modification and review as provided by law.

**CLAIMANT'S CLAIM AGAINST THE SECOND INJURY FUND IS DENIED.**

The compensation awarded to the claimant shall be subject to a lien in the amount of **24% (AS REQUESTED BY CLAIMANT'S ATTORNEY)** of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: **KEITH YARWOOD.**

## AWARD

Employee:               **LEWIS DANIELS**                               Injury No.   **07-103060**

Employer:               **R & S ELECTRIC**

Additional Party:       **TREASURER OF THE STATE OF MISSOURI AS CUSTODIAN  
OF THE SECOND INJURY FUND**

Insurer:               **TRAVELER'S INSURANCE COMPANY**

Hearing Date:         **SEPTEMBER 8, 2009**                               Checked by: **NGA**

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? **NO**
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: **SEPTEMBER 7, 2007**
5. State location where accident occurred or occupational disease was contracted: **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 WAS INSTALLING A SPEED CONTROL ON A CONVEYOR SYSTEM AND SLIPPED ON SOME SOY BEANS AND FELL.**
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, BACK, AND BODY AS A WHOLE**

14. Nature and extent of any permanent disability: **NONE**

15. Compensation paid to-date for temporary disability: **NONE**

16. Value necessary medical aid paid to date by employer/insurer? **\$571.47**

17. Value necessary medical aid not furnished by employer/insurer? **NONE**

18. Employee's average weekly wages: **N/A**

19. Weekly compensation rate: **\$742.72 / \$389.04**

20. Method wages computation: **BY STIPULATION**

**COMPENSATION PAYABLE**

21. Amount of compensation payable: **NONE**

22. Second Injury Fund liability: **NONE**

**TOTAL: NONE**

23. Future requirements awarded: **NONE**

**CLAIMANT'S CLAIM AGAINST THE EMPLOYER AND THE SECOND INJURY FUND IS DENIED.**

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

Employee:               **LEWIS DANIELS**                               Injury No.   **07-103060**

Employer:               **R & S ELECTRIC**

Additional Party:       **TREASURER OF THE STATE OF MISSOURI AS CUSTODIAN  
OF THE SECOND INJURY FUND**

Insurer:               **TRAVELER'S INSURANCE COMPANY**

Hearing Date:           **SEPTEMBER 8, 2009**       Checked by: **NGA**

Injury Numbers 07-091724 and 07-103060 were heard concurrently.

Prior to presenting evidence, the parties stipulated in Injury No. 07-103060 the following issues were to be determined by this hearing:

1. Was the claimant's accident the prevailing factor in claimant's medical condition?
2. Liability of employer for future medical treatment.
3. Nature and extent of claimant's disability.
4. Liability of the Second Injury Fund.
5. Whether claimant's wife, Linda Daniels, is entitled to benefits under Schoemehl vs. Treasurer of the State of Missouri, 217 SW2d 700 (Mo Banc 2007), should the claimant predecease her.

In Injury No. 07-091724, the parties stipulated the following issues were to be determined by the hearing:

1. Whether the claimant sustained an occupational injury on September 7, 2007.
2. Was the claimant's employment at R & S Electric the prevailing factor in causing his occupational injury on September 7, 2007.
3. Did the employer have proper notice of claimant's alleged occupational disease?
4. Liability of the employer for future medical treatment.

5. Nature and extent of claimant's disability.
6. Liability of the Second Injury Fund.
7. Whether claimant's wife, Linda Daniels, is entitled to benefits under *Schoemehl vs. Treasurer of the State of Missouri*, 217 SW2d 700 (Mo Banc 2007), should the claimant predecease her.

The parties agreed that on September 7, 2007, Lewis Daniels was an employee of R & S Electric.

The employer was operating under the provisions of the Missouri Workers' Compensation Act and was fully insured by Travelers' Insurance Company.

In Injury No. 07-103060, the parties further agreed that on or about September 7, 2007, the claimant sustained an injury by accident arising out of and in the course of his employment. It was admitted that the employee had proper notice of claimant's injury and a timely claim for compensation had been filed. Medical aid in the amount of \$571.47 had been provided.

In Injury No. 07-091724 it was denied that the claimant had sustained an occupational disease. It was also denied the employer had proper notice of claimant's occupational disease. It was admitted the claimant had filed a timely claim for compensation. No medical benefits have been provided.

In both cases, the claimant is not asking for past medical treatment or past temporary total disability compensation. The parties did agree the correct rate of compensation was \$742.72 per week for both temporary total disability and permanent total disability and \$389.04 per week for permanent partial disability.

The claimant testified in person. He was born on August 29, 1950. He was 57 years old on September 7, 2007. He is now 59 years old. He left high school in the 12<sup>th</sup> grade but has a GED.

He has worked as a union electrician performing both commercial and industrial work since joining the International Brotherhood of Electrical Workers in 1974. He worked for various employers as he would be hired out of a hall. He accepted a call to work for R & S Electric on June 5, 2007. He had worked for this employer previously.

On September 7, 2007, the claimant was on a job site. He was installing a speed control on a conveyor system. This conveyor system was located in an area in which soybeans had been allowed to accumulate to a depth of about one foot.

After finishing his installation, he attempted to walk up a concrete ramp with an incline of about 30 degrees. He slipped on the soy beans. He attempted to catch his balance, grabbing a handrail, but he struck his head on a metal rail. He ended up flat on his back on the concrete floor.

He did not have immediate severe pain. He reported the accident to his supervisors. Over the weekend the claimant's condition became much worse and he now has pain in his cervical, thoracic and lumbar spine.

The claimant said that for his entire career as an electrician, he had been subject to hard physical and repetitive motion. He would spend 30% of his time "pulling wire". This was pulling wire through a conduit. This would place stress on his shoulder and neck. Sometimes the pulling of wire was so difficult that he would have to gain leverage by bracing his foot another surface.

He also spent about 20% of his time "running pipe". This is setting anchors for conduit overhead, reaching overhead, and moving bundled pipe weighing 80-to-100 pounds. This put more stress on his neck and shoulders.

The claimant assumed his pain came from his fall. He asked for medical treatment. He went to his own family doctor, Dr. John Campobasso, who prescribed Vicodin for pain. He said this needs to be taken in the future. Mr. Daniels says he does not like to take pain medication and does not hardly ever use it.

The employer sent the claimant to Dr. Chris D. Fevurly, MD. Dr. Fevurly testified by deposition taken on March 25, 2009 and admitted into evidence as Employer and Insurer's Exhibit #2. All objections thereto are hereby overruled.

Dr. Fevurly found the claimant had chronic and a regional neck and low back pain with advanced degenerative changes in both his cervical and lumbar spine. He further said, "I think his cervical thoracic degenerative disk disease and spondylosis is the prevailing cause of his chronic neck and upper back pain." He went on to state, "I believe that the cervical degenerative disk disease and spondylosis result as a natural consequence of living and aging, predominately

produced by genetic factors and secondarily produced by environmental factors, particularly cigarette smoking. He also said the claimant had peripheral vascular disease.

Dr. P. Brent Koprivica testified by deposition taken on December 16, 2008 and admitted into evidence as Claimant's Exhibit Number 1. All objections thereto are hereby overruled.

Dr. Koprivica said when considering the effect of the September 7, 2007 fall said, "I do not believe the one-time event is the prevailing factor in his disabling symptomology."

He also found that the claimant had an underlying vascular insufficiency involving his liver extremities due to generalized arteriosclerosis. For other pre-existing conditions, Dr. Koprivica assigned a 25% permanent partial disability to the body as a whole.

Dr. Koprivica did find that Mr. Daniels' job as an electrician required extensive overhead activities, represented a risk that is unique to his employment. He stated that this is the prevailing factor in the claimant's chronic cervical, thoracic, and lumbosacral pain. He rated the claimant as having a 35% permanent partial disability to the body as a whole.

He did not consider the condition to be totaling debilitating in isolation in and of itself. He did give his opinion that the claimant is permanently totally disabled as a result of the permanent partial disability that he apportioned for the claimant's pre-existent vascular disease in combination with that arising from the claimant's occupational disease from repetitive injury.

Dr. Koprivica did note that the claimant had refused to have a series of epidural steroid injections. He also noted that the claimant smoked a pack of cigarettes a day. This can't be good for his vascular disease.

Michael J. Dreiling testified by deposition taken on January 14, 2009 and admitted into evidence as Claimant's Exhibit Number 2. All objections thereto are hereby overruled.

Mr. Dreiling is a vocational expert. He testified that he had reviewed the claimant's restrictions and found that when these are combined with the claimant's age, lack of education, and transferable skills, he reached the opinion that no employer in the usual course of business seeking persons to perform duties of employment in this usual and customary way, would be expected to employ this individual in his existing physical condition.

When asked by the Second Injury Fund if the claimant would be totally precluded from finding employment back only in the restrictions given for his injury of September 7, 2007, he answered affirmatively.

Mr. Daniels testified that prior to September 7, 2007, he was never disciplined or demoted for failing to perform his job duties properly, nor was he ever terminated from a job for that reason. He always received good evaluations and received raises prior to September 7, 2007 as well. He never needed nor was he given accommodations with his work due to neck or low back problems or for his pre-existing vascular condition prior to September 7, 2007. His vascular condition did not cause any problems for him at work prior to September 7, 2007. He was not taking any prescribed medication for the condition prior to September 7, 2007.

In Injury No. 07-103060, the claimant's own doctor found that his fall was not the prevailing factor in his present medical condition.

In Injury No. 07-103060, I find that the claimant has failed to prove that the claimant slipping and falling on the soy beans was a prevailing factor in his present condition. It did not cause his injury. Claimant's claim for compensation in Injury No. 07-103060 is denied against both the employer and the Second Injury Fund.

In Injury Number 07-091724, I do find that the claimant's repetitive pulling wire and working above his head is the prevailing factor in the claimant's injury to his neck and body as a whole but not to his degenerative condition of his thoracic or lumbar spine.

I do not believe the claimant is anywhere near being totally disabled. He has not had any surgery. No one has ever recommended surgery. The claimant has not had a single epidural steroid shot. If he was in such pain as he claims, he would have tried some option to reduce his pain. The claimant still smokes. Stopping

smoking may have helped his prior vascular condition. It certainly could have a future effect on his vascular condition.

Dr. Koprivica rated the claimant at 35% of the body as a whole. I believe his disability is substantially less than 35%.

I find that the claimant provided the employer with timely notice of his occupational disease as soon as it was diagnosed.

In 07-091724, I find and believe from the evidence that as a result of claimant's occupational disease of September 7, 2007, the claimant has sustained an injury to his cervical spine resulting in a permanent partial disability of 10% body as a whole. The employer is hereby ordered to pay to the claimant the sum of \$389.04 per week for 40 weeks for a total of \$15,561.60.

The claimant's case against the Second Injury Fund is denied because the claimant failed to prove a pre-existing industrial disability. Even if the claimant's pre-existing vascular condition had reached the status of an industrial disability, it could not have exceeded 10% of the body as a whole and is less than the required threshold of 12-1/2% body as a whole or 15% of an extremity for permanent partial cases.

A lien in the amount of 24% of this award is hereby assigned to Keith V. Yarwood for necessary legal services provided the claimant. This is the amount Mr. Yarwood requested.

Date: December 3, 2009

Made by: /s/ Nelson G. Allen  
*Nelson G. Allen,*  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

This Award is dated and attested to this 3rd day of December, 2009.

/s/ Naomi Pearson  
**Naomi Pearson**  
Division of Workers' Compensation