

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

Injury No.: 04-148632

Employee: Linden Dauenbaugh  
Employer: Bobby Pankey & Sandra Pankey d/b/a West Plains Taxi  
Insurer: Uninsured  
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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 31, 2009. The award and decision of Administrative Law Judge David L. Zerrer, issued March 31, 2009, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 30th day of July 2009.

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

# AWARD

Employee: Linden Dauenbaugh Injury No. 04-148632

Dependents: Before the

Employer: Bobby Pankey & Sandra Pankey d/b/a West Plains Taxi **DIVISION OF WORKERS' COMPENSATION**  
Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Additional Party:

Insurer: Uninsured

Hearing Date: April 24, 2008 Checked by: DLZ

## FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: May 6, 2004
5. State location where accident occurred or occupational disease was contracted: Howell 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? No
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Motor vehicle accident
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: Cervical/Body as a whole
14. Nature and extent of any permanent disability: 35% Body as a whole; 10% at the 207-week level
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? \$46,673.41
18. Employee's average weekly wages: \$350.35

19. Weekly compensation rate: \$233.56
20. Method wages computation: Employer agree

### COMPENSATION PAYABLE

21. Amount of compensation payable: None

Unpaid medical expenses: \$44,886.41

6 weeks of temporary total disability (or temporary partial disability) - \$1,401.36

160.7 weeks of permanent partial disability from Employer - \$37,533.09

-0- weeks of disfigurement from Employer

22. Second Injury Fund liability: Yes:  No  Open

28.0425 weeks of permanent partial disability from Second Injury Fund - \$6,549.60

Uninsured medical/death benefits \$44,886.41

Total: \$90,370.46

23. Future requirements awarded: None

Said payments to begin immediately 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% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Randy C. Alberhasky

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Linden Dauenbaugh

Injury No: 04-148632

Dependents:

Before the

Employer: Bobby Pankey & Sandra Pankey d/b/a West Plains Taxi

**DIVISION OF WORKERS'**

**COMPENSATION**

Department of Labor and Industrial

Additional Party:

Relations of Missouri

Jefferson City, Missouri

Insurer: Uninsured

Checked by: DLZ

On the 24th day of April, 2008, the date specifically set for final hearing of this claim, the Claimant and the Second Injury Fund appeared before the undersigned Administrative Law Judge for final hearing. The Claimant appeared in person and by his attorney, Randy C. Alberhasky. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, appeared by Assistant Attorney General, Cara Harris. Neither Bobby Pankey nor Sandra Pankey d/b/a West Plains Taxi, hereafter referred to as Employer, nor Employer's attorney appeared at the hearing. Employer's counsel, after being contacted by telephone, stated that neither he nor the Employer would appear and that the hearing may proceed *in absentia*.

Following the hearing, on or about April 24, 2008, Employer filed for relief pursuant to the Federal Bankruptcy Law; and a stay order was entered staying any proceedings which may attempt to collect any debt from the Employer. The bankruptcy proceedings were dismissed by the United States Bankruptcy Court, Western District of Missouri, on the 28th day of January, 2009, Arthur B. Freeman, Judge. The Division of Workers' Compensation was notified of the bankruptcy dismissal on February 13, 2009.

The parties appearing for the hearing stipulated to certain facts which are not at issue in this claim, as follows, to wit: The Employer's liability was uninsured; on the alleged injury date of May 6, 2004, Linden Dauenbaugh was an employee of the Employer; the parties agree that on or about May 6, 2004, Claimant sustained a motor vehicle accident; the employment occurred in Howell County, Missouri, and the parties agree that Howell County, Missouri, is the proper venue for this hearing; at the time of the claimed accident, Claimant's average weekly wage was \$350.35, sufficient to allow a compensation rate of \$233.56 for temporary total disability, permanent partial disability; no temporary disability benefits have been paid prior to the date of this hearing; no medical benefits have been paid prior to the date of this hearing; Claimant's attorney seeks approval of an attorney fee of 25% of the amount of any award.

## ISSUES

Whether on or about May 6, 2004, the Employer was operating subject to the Missouri Workers' Compensation Law.  
Whether the Claimant gave proper notice.

Whether the accident arose out of the course of and scope of employment.

Whether the accident caused the injuries and disabilities for which benefits are now being claimed.

Whether the Employer is obligated to pay for past medical expenses.

Any temporary total benefits owed to the Claimant.

The nature and extent of any permanent disabilities.

The liability of the Second Injury Fund for enhanced permanent partial disability, and whether the Second Injury Fund is liable for the reasonable and necessary medical expense of the Claimant.

Whether the Claim was filed within the time prescribed by Section 287.430

## DISCUSSION

Claimant testified on his own behalf. Claimant was 60 years of age at the date of the hearing. He has been married for 25 years and has two adult, emancipated children. Claimant did not graduate from high school, but did obtain his GED and attended college for two years.

Claimant testified that he began employment in medical transportation in October 2003 when employed by Employer at a time when Employer operated a taxi business, a medical transportation business, and a pest control business. Employer had four taxis and about eight medical transport vehicles. Claimant testified that in May 2004 Employer had four or five drivers who worked sporadic hours, as did the Claimant depending on assignments. Claimant was on call every day for emergency transportation services.

Claimant testified that Sandra Pankey scheduled assignment of drivers. Claimant further testified that vehicles were owned by Employer, and the Employer provided insurance on the vehicles. Claimant was responsible for keeping a log book for each transportation service provided, and the log book was turned into Sandra Pankey. Claimant testified that his work hours varied, depending on assignment, but on some days he worked as much as sixteen hours in one workday. Claimant was paid once per month on the basis of the log book.

Claimant testified that for a time he was paid in cash for his employment, but that, at the time of the accident, he was paid by check drawn on Bobby D. Pankey and Sandra C. Pankey d/b/a West Plains Taxi and B & B Pest Control.

Claimant testified that the physical requirements of his job were not demanding unless he would have to assist a patient into and out of the vehicle, and sometimes he would have to lift and/or carry a wheelchair.

Claimant testified regarding the accident of May 4, 2004. Claimant had completed a medical transport assignment and was returning to West Plains. While traveling on Highway 17 at about 9:15 p.m., a bull entered the roadway in front of Claimant's vehicle, and Claimant struck the bull with sufficient force that the animal came over the hood and through the windshield of Claimant's vehicle. Claimant testified that he called the dispatcher, using his cell phone, and reported what had occurred. Claimant testified that Bobby Pankey came out to the scene of the accident. Bobby Pankey asked Claimant if he was okay, and Pankey placed Claimant into Pankey's vehicle and brought Claimant back to West Plains. After Claimant returned to his home on the night of the accident, he began to experience pain from a headache, he had stiffness in his neck, and his left hip felt sore.

Claimant testified that he sought treatment the next day following the accident, complaining of headache and neck pain. Claimant testified that both Bobby Pankey and Sandra Pankey authorized Claimant to go to the doctor; however, Bobby Pankey told Claimant at that time that they did not have insurance on the drivers. Claimant testified that he contacted the insurance carrier for the farmer who owned the bull, but that there was no liability coverage for this accident on behalf of the farmer.

Claimant testified that he continued to experience pain continually until November 2004 and that the pain grew worse with time. Claimant was referred to Dr. Vicker who scheduled an MRI. Claimant testified that he thought Employer paid the bill for the MRI treatment. Claimant testified that he next saw Dr. Martin for the pain being experienced in Claimant's neck and that he was eventually referred on to Dr. Kelly Green who performed surgery on Claimant's neck.

Claimant testified that after the surgery he was off work for about eight weeks and that he returned to work after the surgery in May 2005.

Claimant identified that Exhibits A, B, C, D, E, F, and G set out treatment records for treatment administered as a result of the May 6, 2004, accident. Exhibits G, I, J, K, and L, set out copies of billing statements attributable to treatment provided to the Claimant as a result of the May 6, 2004, accident. Claimant testified that he was reimbursed \$77.00 by Employer for one medical bill. Claimant was aware that Employer paid the bill set out in Exhibit G, in the amount of \$1,710.00.

Claimant testified that his current complaints as a result of the accident of May 6, 2004, are that he suffers from chronic headaches; dizziness if he looks up too much; cannot sleep on stomach because of neck pain; and reduced range of motion in the neck. Claimant is not on any medication at the date of the hearing.

Claimant testified that he did not have any trouble with his neck prior to May 2004. He further testified that he had a previous history of right-shoulder surgery which was supposed to restrict him from lifting things overhead. Claimant testified that he had two surgeries on his right shoulder and that his right shoulder suffers from chronic soreness. Claimant also testified concerning a motor vehicle accident which occurred in November 2000, which resulted in a punctured lung, an injury to his left small finger, and injury to his left upper arm.

Claimant testified that he is currently employed since February 2007 as a medical transportation driver and that he has not been employed by the Employer since January 2007.

Claimant admitted on cross-examination that he was able to perform all his job tasks prior to the 2004 injury. He further admitted that his only prior surgery was to the right shoulder, that his left wrist condition recovered well, and that he made a full recovery following the motor vehicle accident of 2000. Claimant admitted that he had to help patients from time to time and that he was able to help patients without experiencing right-shoulder pain.

Dr. Jerome Levy testified on behalf of the Claimant by deposition. Dr. Levy testified that he performed an Independent Medical Evaluation upon Claimant on December 17, 2006. Dr. Levy testified that he took a history from the Claimant, including, but limited to, a history with regard to the facts surrounding Claimant's injury of May 6, 2004. Dr. Levy further testified that he examined medical records which indicated that Claimant underwent surgery to fuse the C5-6 and C6-7 levels of the cervical spine. He testified that the operative report showed two-level herniated disks which were removed and replaced with hardware.

Dr. Levy testified concerning medical records with regard to treatment of Claimant's left shoulder in January 2001, including an MRI and a nerve conduction study performed on Claimant's left hand. Dr. Levy further testified that the records indicated that Claimant suffered a left shoulder injury due to Claimant's involvement in an accident and left wrist carpal tunnel syndrome. Claimant had surgery to his left wrist to remove synovitis from the wrist.

Dr. Levy testified that Claimant's neck range of motion was diminished and that the range of motion of Claimant's right shoulder and left shoulder were diminished, right more than left. Dr. Levy testified that in his opinion Claimant's discectomy and multi-level fusion with plates, screws, bone and spacers, as well as chronic cervical strain with stiffness, along with chronic strain on the left hip were all attributable to the injury of May 6, 2004. Dr. Levy also testified that Claimant had preexisting degenerative changes in his neck which were asymptomatic prior to the injury

of May 6, 2004. Dr. Levy opined that the accident of May 6, 2004, was a substantial factor in the need for treatment and that the treatment received was reasonable and necessary to cure and relieve the Claimant of the effects of the injury.

Dr. Levy testified that he rated Claimant's neck injury at 50% of the body as a whole and the hip injury at 10% of the left-lower extremity at the hip. Dr. Levy further testified that he restricted Claimant to lifting not more than 20 pounds and no lifting overhead, no work positions of lifting overhead and looking up while working.

Dr. Levy declined to give an opinion as to how many weeks Claimant was unavailable for work on the open-labor market during the period after his injury until he was released to return to work after his neck surgery. Dr. Levy did testify that 6 weeks of temporary disability would be appropriate for neck fusion surgery.

On cross-examination, Dr. Levy admitted that Claimant had no MRI prior to the date of his injury and that Claimant did have degenerative changes in the cervical spine prior to the accident of May 6, 2004. Dr. Levy further admitted that the disk bulge of Claimant's neck was caused by the accident of May 6, 2004.

Employer presented no written or oral evidence.

Second Injury Fund presented no written or oral evidence.

## **FINDINGS OF FACT AND RULING OF LAW**

**Whether on or about May 6, 2004, the Employer was operating subject to the Missouri Workers' Compensation law.**

**Whether the Claimant gave the Employer proper notice.**

**Whether the accident arose out of the course of and scope of employment.**

**Whether the accident caused the injuries and disabilities for which benefits are now being claimed.**

Claimant testified as to the number of people who worked for the Employer in either the medical transport part of the business or the local cab part of the business. Claimant testified that more than five people were employed. Claimant also testified that one of the owners of the Employer came to the scene of the accident and drove Claimant back into town on May 6, 2004. Employer had actual notice of Claimant's accident on the date that the accident occurred. Dr. Levy testified that Claimant's accident of May 6, 2004, was a substantial factor, and the prevailing factor, for the need for Claimant's neck-fusion surgery. Dr. Levy rated Claimant's disability which occurred as a direct result of the injury, and Claimant testified concerning the resulting effects of the accident and the subsequent surgery to his neck. The testimony of Claimant was uncontroverted, and the testimony of Dr. Levy was subject to cross-examination by the Employer.

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find there is substantial and competent evidence that Employer was subject to the Missouri Workers' Compensation Law on the date of the injury. I further find that there is substantial and competent evidence that Employer was aware and had actual notice of the accident on the date of the injury to the Claimant.

I further find that there is substantial and competent evidence that Claimant's accident arose out of the course of and scope of employment and that Claimant's injuries and disabilities were caused by the accident which occurred on May 6, 2004, when Claimant was traveling on a medical transport delivery at a time when a bull struck the front of the Employer's vehicle which Claimant was driving at the time, causing Claimant to require medical treatment and further causing Claimant permanent disability to his body.

I find these issues in favor of Claimant.

**Whether the claim was filed within the time prescribed by Section 287.430.**

Claimant's Claim for Compensation was filed November 1, 2006. The original claim was later amended by filing with the Division on August 27, 2007. Claimant admitted Exhibit M, which is a copy of the original Claim for Compensation. There is no evidence presented at the hearing that Employer filed a Report of Injury in a timely manner. After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that Claimant's Claim for Compensation was filed within the time prescribed by Section 287.430.

**Whether the Employer is obligated to pay for past medical expenses.**

Claimant received medical attention from the day after the accident until eventually it was determined that Claimant would need a multi-level fusion in his neck to cure and relieve the effects of his injury. Dr. Levy testified that Claimant's accident of May 6, 2004, was a substantial factor and was the prevailing factor in causing the need for Claimant's medical treatment. Claimant admitted into evidence Exhibits I, J, K, and L, which total the sum of \$44,963.41. Claimant testified that Exhibits I, J, K, and L constituted all the medical expenses which he incurred to obtain treatment which was a direct result of the accident of May 6, 2004. Claimant admitted that he thought

Employer paid \$77.00 of the amount of medical bills admitted into evidence. Exhibit G contained billing records for treatment in the amount of \$1,710.00. Claimant admitted that the expenses set out in Exhibit G were paid by the Employer.

After a review of all the evidence presented at the hearing, both oral and written, and based on the record as a whole, I find that the medical bills set out in Exhibits G, I, J, K, and L constitute reasonable and necessary charges for medical treatment necessary to cure and relieve Claimant of the effects of his injury of May 6, 2004, and that Employer is responsible for the payment of said medical expense. I further find that Employer is entitled to credit for the sum of \$1,794.00 for medical expense paid by the Employer prior to the date of the hearing.

Employer is hereby ordered to reimburse Claimant in the amount of \$44,886.41, as and for medical expenses incurred by the Claimant which are the responsibility of the Employer to pay, as a result of Claimant's injuries of May 6, 2004.

I find this issue in favor of Claimant.

**Any temporary total benefits owed to Claimant.**

Claimant testified that he was off work for a period of time following his neck fusion surgery. Dr. Levy testified that 6 weeks was an appropriate amount of time to remain in off-work status following neck surgery. After a review of all the evidence presented at the hearing, both oral and written, and based on the record as a whole, I find there is substantial and competent evidence that Claimant is entitled to 6 weeks of temporary total benefits. The compensation rate for this injury is found to be \$233.56. Employer is hereby ordered to pay to Claimant the sum of \$1,401.36, as and for temporary total disability benefit.

I find this issue in favor of Claimant.

**The nature and extent of any permanent disabilities.**

Claimant testified as to the change in the range of motion in his neck since the accident, as well as the chronic pain he suffers in the neck region. Dr. Levy rated Claimant's disability at 50% of the body as a whole referable to the neck and 10% of the lower extremity referable to the left hip. Dr. Levy admitted on cross-examination that Claimant suffered from degenerative changes in the cervical region prior to the accident.

After a review of all the evidence presented at the hearing, both oral and written, and based on the record as a whole, I find that Claimant has suffered a 35% permanent partial disability to the body as a whole as a result of this injury alone, referable to the neck. I further find that Claimant has suffered a permanent partial disability of 10% of the lower extremity referable to the 207-week level. Claimant's compensation rate is found to be \$233.56.

Employer is hereby ordered to pay to Claimant the sum of \$37,533.09, as and for permanent partial disability (400 x 35% = 140 weeks) (207 x 10% = 20.7 weeks) (140 + 20.7 = 160.7 x \$233.56 = \$37,533.09).

**The liability of the Second Injury Fund for enhanced permanent partial disability and whether the Second Injury Fund is liable for the payment of reasonable and necessary medical expenses of the Claimant.**

Employer is found to be uninsured. Based on the previous findings and rulings set out in this award, I find that Employer has failed to pay the medical expenses incurred by Claimant which were reasonable and necessary to cure and relieve the effects of Claimant's injuries of May 6, 2004. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is hereby ordered to pay to Claimant the sum of \$44,886.41, as and for reimbursement of medical expenses incurred by the Claimant and which were reasonable and necessary to cure and relieve the Claimant of the effects of his injuries. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is hereby granted the right of recoupment from the Employer for any amounts paid by the Second Injury Fund to reimburse Claimant for medical expenses which were the responsibility of the Employer, as ordered in this award.

I find that Claimant presented substantial and competent evidence that Claimant suffered medical conditions and/or injuries prior to the date of Claimant's injuries on May 6, 2004.

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that Claimant suffered a preexisting injury to the left wrist which caused a permanent disability of 15% to the left upper extremity at the 175-week level.

Claimant's current injury totaled 160.7 weeks of disability. Claimant's preexisting disability is 26.25 weeks of disability. The total disability of both the current injury and the pre-existing is 186.95 weeks. I find that a multiplier of 15% to the total number of weeks of disability is fair and reasonable. Therefore, the Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is hereby ordered to pay to Claimant the sum of \$6,549.60, (186.95 x 15% = 28.0425 weeks x \$233.56 = \$6,549.60).

Claimant's attorney requested approval of an attorney fee of 25% of the amount of any award. Claimant's attorney fee request is hereby approved at 25% of the amount of this award. Claimant's attorney is granted a lien on

the proceeds of this award unless and until the attorney fee shall have been paid in full.

The final hearing in this claim was conducted on April 24, 2008. Thereafter, on April 25, 2008, Employer filed for bankruptcy protection and a stay order was entered by the Bankruptcy Court. Thereafter, on January 28, 2009, an Order of Dismissal Without Prejudice was entered by the Bankruptcy Court for the Western District of Missouri, which order was filed with the Division February 13, 2009. This award, and the rulings and orders set out herein, are timely entered after February 13, 2009.

Date: March 31, 2009

Made by: /s/ David L. Zerrer  
David L. Zerrer  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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