

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

Injury No.: 03-046700

Employee: Lorenzo Garcia
Employer: Collene Concrete, Inc. (Settled)
Insurer: Zurich North American Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: April 23, 2003
Place and County of Accident: Unknown County in Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 1, 2005. The award and decision of Administrative Law Judge Paula A. McKeon, issued September 1, 2005, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 15th day of March 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Lorenzo Garcia Injury No. 03-046700

Dependents: N/A
Employer: Collene Concrete, Inc.
Insurer: Zurich North American Insurance Company
Additional Party: Missouri State Treasurer, Custodian of Second Injury Fund
Hearing Date: June 29, 2005 Checked by: PAM/lh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: April 23, 2003.
5. State location where accident occurred or occupational disease was contracted: Unknown city and county in 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: Lorenzo Garcia injured his back when he was struck by a concrete buggy in the course and scope of his employment with Collene Concrete.
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: body as a whole back
14. Nature and extent of any permanent disability: 12.5 percent permanent partial disability to the body as a whole
15. Compensation paid to-date for temporary disability: \$5,949.12.
16. Value necessary medical aid paid to date by employer/insurer? \$7,117.35.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: N/A.
19. Weekly compensation rate: \$649.42/\$340.12.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: N/A
22. Second Injury Fund liability: Yes.
Permanent total disability benefits beginning September 23, 2003, for \$309.30 for 52 ½ weeks, then \$649.32 payable weekly for lifetime of Claimant.

TOTAL:

23. Future requirements awarded: N/A

Said payments to begin upon receipt 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 24 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Michael Downing.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Lorenzo Garcia

Injury No: 03-046700

Dependents: N/A

Employer: Collene Concrete, Inc.

Insurer: Zurich North American Insurance Company

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

Hearing Date: June 29, 2005

Checked by: PAM/lh

On June 29, 2005, the parties appeared for hearing. The Employee and Employer settled the claim for permanent partial disability prior to hearing. The Division had jurisdiction to hear this claim pursuant to §287.110. The Employee, Lorenzo Garcia, appeared in person and with counsel Michael Downing. The Second Injury Fund appeared by Assistant Attorney General Carolyn McCarthy.

STIPULATIONS

At the hearing the parties stipulated to the following:

- 1) that all liability of the Employer was fully insured by Zurich American Insurance Company;
- 2) that on or about April 23, 2003, Lorenzo Garcia was an employee of Collene Concrete;
- 3) that the Employer had notice of the injury and a timely claim for compensation was filed;
- 4) that a compensation rate for Lorenzo Garcia is \$649.32/\$340.12.

ISSUES

The parties requested the Division to determine:

- 1) whether the Employer and Employee were operating under and subject to the provisions of the Missouri

- workers' compensation law;
- 2) whether Lorenzo Garcia sustained an accident in Jackson County, Missouri;
 - 3) whether Lorenzo Garcia sustained an accident arising out of and in the course of his employment with Collene Concrete on April 23, 2003; and,
 - 4) whether the Second Injury Fund is liable for permanent total disability benefits.

FINDINGS AND RULINGS

Lorenzo Garcia, Kansas resident, is a 54-year-old former concrete worker. Garcia worked for Collene Concrete located in Kansas City, Kansas as a working foreman. Garcia's job duties included supervision and assistance with fabrication and installation of commercial and residential concrete slabs, driveways and foundations, etc. Garcia was involved in tear-out, setting forms, pouring concrete, measuring and concrete finish work. Collene Concrete performs jobs for clients in Missouri, Kansas and Oklahoma.

On April 23, 2003, Garcia testified that he was performing "flat job" work at a warehouse. Garcia does not remember the name of the warehouse or where the jobsite was specifically located. Garcia believed the jobsite to be in Missouri, possibly near I-70 and an unidentified golf course.

Garcia was driving a concrete buggy. Garcia was in line to load up with concrete when another buggy hit him from behind. Garcia injured his low back. Garcia was sent for medical treatment the following day.

Garcia received conservative treatment, including epidural steroid injections. Garcia was diagnosed with multi-level degenerative disc disease with right disc protrusion at L5-S1. Garcia was released with permanent restrictions of 25 pounds lifting, limited stooping, bending and alternate sit/stand option. Garcia received a workers' compensation settlement of 12.5 percent body as a whole or \$17,006. Garcia did not return to concrete work following his 4/23/03 injury. Garcia did attempt to obtain employment with a laundry mat but quit within a week due to pain in his back.

Garcia has limited educational background. Garcia has a ninth grade education and no GED. Garcia has no vocational or other formal training. Garcia testified that he is unable to read or write.

Garcia has an extensive history of prior injuries. In 1972 Garcia sustained a right arm and left ankle injury from a tire explosion. Garcia received surgery and internal fixation for a fractured right arm and left ankle. Garcia was able to return to work after a nine-month recovery. Garcia continues to have complaints of left ankle pain and difficulty with walking and kneeling. Garcia still has the hardware in place in his right arm and left ankle.

Garcia had a right knee injury in 1995. Garcia had surgery and was off work for a period of time. Garcia had trouble with kneeling, climbing and steps following his right knee injury. Garcia had a cervical disc injury in 1991. Garcia received conservative treatment for this injury. Garcia was off work for approximately one year.

In 1999, Garcia fell in a hole and tore ligaments and muscles in his left knee. Garcia had two surgeries on the left knee after he tripped and fell another time following the initial surgery. In 2001, Garcia broke his hand while drilling a wall. Garcia had surgery on the hand and was off work for approximately three months. Garcia indicated he had been diagnosed in 2001 or 2002 with bilateral carpal tunnel syndrome, which he has described common among concrete finishers. Mr. Garcia was prescribed braces for both wrists. Garcia testified to ongoing problems with each of these injuries for which he received workers' compensation settlements.

Garcia was evaluated by Dr. Koprivica on December 19, 2003. Dr. Koprivica testified that Garcia had significant pre-existing disability that was a hindrance or obstacle to his employment or reemployment. Dr. Koprivica specifically attributes 25 percent permanent partial disability to Garcia's left ankle, 35 percent permanent partial disability to his right knee, 40 percent permanent partial disability to his left knee, 15 percent body as a whole to cervical problems, and 20 percent permanent partial disability to his right forearm all predating Garcia's injury ON April 23, 2003. Dr. Koprivica believes that Garcia is permanently and totally disabled as a result of the combined effects of his April 23, 2003 injury and his preexisting disabilities.

Michael Dreiling, vocational expert, evaluated Garcia on February 16, 2004. Mr. Dreiling opined that Garcia was permanently and totally disabled and unable to compete in the open labor market. Mr. Dreiling believes considering Garcia's significant physical restrictions, work history and limited education, no reasonable employer would be expected to hire him.

The Second Injury Fund denies Garcia and his employer, Collene Concrete, were operating under and subject to the provisions of the Missouri workers' compensation law.

Missouri workers' compensation coverage extends to all injuries received in this state. §287.110.2 provides:

“This chapter shall apply to all injuries received and occupational diseases contracted in this state regardless of where the contract of employment was made and also to all injuries received and occupational diseases contracted outside of this state under contract of employment made in this state unless the contract of employment in any case shall otherwise provide and also to all injuries received and occupational disease contracted outside of this state where the employee’s employment was principally localized in this state.”

Missouri courts have held that the claimant has the burden of proof in showing Missouri workers' compensation statutes apply to his case. “The general rule is that claimant has the burden of proof as to his right to compensation under the Missouri workers' compensation statute.” Redden v. Dan Redden Company, 859 S.W.2d 207, 210 (Mo Court App 1993). The burden of proof as to the applicability of the Missouri workers' compensation resides with the person asserting the benefits under the act, Hogue v. Wurdack, 298 S.W.2d 492, 499 (Mo Court App 1957).

When it comes to jurisdiction, the claimant has to bring facts to bear that decisively place the case properly in Missouri courts. For facts that are critical to jurisdiction, the claimant bears the burden of sustaining those facts “both as to proof and persuasion”. Hall v. Denver Chicago International, Inc., 481 S.W.2d 622, 625 (Mo. Court App. 1972) “The claimant must prove the Industrial Commission had jurisdiction over the subject matter” *id* 627 (even where a report of injury is filled out in accordance with Missouri law, claimant was still properly denied benefits when he failed to prove a Missouri employment contract for an out-of-state injury).

Courts have also found that substantial evidence is required to uphold a claimant’s burden in showing jurisdiction is proper. Even in cases where the Court has found proper evidence for jurisdiction, the Court relied not on the mere testimony of the claimant, but also on the employer’s acknowledgement that there was not factual issue about whether the claim was properly in Missouri.

In this case, Garcia lives in Kansas. He was hired in Kansas. His employer is principally located in Kansas. Garcia testified he worked in several different states, including Missouri, Kansas and Oklahoma. Garcia testified he knows the jobsite was on I-70 near a golf course and it was in Missouri. He couldn’t remember the address. He couldn’t remember the county. He couldn’t remember the name of the jobsite. Despite his inability to remember specifics, Garcia’s testimony that his accident happened in Missouri is sufficient to attach Missouri jurisdiction. Furthermore, the Employer and Employee both entered into a compromise lump sum settlement under the Missouri Workers’ Compensation Statutes. Therefore, I find that both the Employer and Employee were operating under and subject to the provisions of the Missouri workers' compensation law.

I further find based on the Claimant’s testimony that Lorenzo Garcia sustained an accident arising out of and in the course of his employment with Collene Concrete on April 23, 2003. I further find that Garcia sustained 12.5 percent permanent partial disability directly attributable to his April 23, 2003 injury.

Since I have found Missouri has jurisdiction of this claim, and an accident occurred on April 23, 2003, a determination of whether Garcia is permanently totally disabled must be made.

Garcia claims he is permanently totally disabled. Chatmon v. St. Charles County Ambulance District, 555 S.W.3d 451 (Mo. App. E.D., 2001) outlines the basis for permanent total disability.

“Total disability” means inability to return to any employment and not merely... inability to return to the employment in which employee was engaged at the time of the accident.” §287.020.7 (RSMo 2000). “The test for permanent total disability is a worker’s ability to compete in the open labor market and that it measures the worker’s potential for returning to employment.” Sutton v. Vee Jay Cement Contracting Co., 37 S.W.3d 803, 811 (Mo.App. 2000). “The critical question then becomes whether any employer in the usual course of employment would reasonably be expected to hire this employee in his or her present physical condition.” Reese v. Gary and Roger Link, Inc., 5 S.W.3d 522, 526 (Mo.App. 1999).

I find Claimant, Lorenzo Garcia, to be permanently totally disabled.

Dr. Koprivica determined Garcia to be permanently totally disabled. Michael Dreiling, vocational expert, testified no employer would reasonably be expected to hire Garcia in his present condition.

Since I have determined Garcia to be permanently totally disabled, the next question is whether Garcia is permanently totally disabled due to the April 23, 2003 accident or from a combination of preexisting disabilities.

In order to establish Second Injury Fund liability for permanent total disability benefits, Garcia must prove the following:

- 1) that he has a permanent disability resulting in a compensable work-related injury;
- 2) that he has a permanent disability predating the compensable work-related injury which is of "such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the employee becomes unemployable." §287.220.1 RSMo. Garribay v. Treasurer, 930 S.W.2d 57 (Mo.App. 1956), Rose v. Treasurer, 899 S.W.2d 563 (Mo. App. 1995), Luetzinger v. Treasurer, 895 S.W.2d 591;
- 3) that the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time of the last injury result in permanent total disability, Boring v. Treasurer, 947 S.W.2d 483 (Mo.App. 1997), Reiner v. Treasurer, 832 S.W.2d 152 (Mo.App.1994).

Garcia has met the first test for establishing Second Injury Fund liability.

Garcia must also prove the preexisting disability is a hindrance or obstacle to employment. I find that Garcia did have a long history of physical injuries, which constitute a hindrance or obstacle to his employment. Dr. Koprivica acknowledges Garcia's multiple preexisting injuries. Dr. Koprivica attributes percentages to Garcia's preexisting physical disability as well. Garcia received several workers' compensation settlements for preexisting disability. There is no question that Garcia had an actual and measurable preexisting disability, which created a hindrance or obstacle to Garcia's employment or reemployment. Garcia sustained his burden of proof in that regard.

Finally having found Garcia to have sustained significant permanent partial disability as a result of his April 23, 2003 injury, I find Lorenzo Garcia to be permanently and totally disabled as a result of the combined effects from his April 23, 2003 injury and his preexisting disabilities.

Based on the evidence, I find that Garcia's disability became permanent effective September 25, 2003. The employer/insurer's liability for 52.5 weeks of compensation for permanent partial disability at the rate of \$340.12 per week began on September 25, 2003. The Second Injury Fund became liable for \$309.30 per week beginning on that date and continuing for the next 52.5 weeks. The \$309.30 represents the difference between the permanent total disability rate of \$649.32 and the permanent partial disability rate of \$340.12 per week. Once the 52.5-week time period expired, the Second Injury Fund became liable for \$649.32 per week in permanent total disability benefits. The Second Injury Fund shall remain liable for such benefits for as long as Garcia remains so disabled.

An attorney lien of 24 percent of all compensation awarded herein is allowed Michael Downing, Garcia's attorney, for necessary legal services rendered.

Date: _____ Made by: _____

Paula A. McKeon
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation