

FINAL AWARD ALLOWING COMPENSATION

(Affirming Corrected Award and Decision of Administrative Law Judge)

Injury No.: 01-137020

Employee: Todd Grauberger

Employer: Atlas Van Lines, Inc.

Insurer: Legion Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, heard oral argument, and considered the whole record, the Commission finds that the corrected 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 § 286.090 RSMo, the Commission affirms the corrected award and decision of the administrative law judge dated March 3, 2011.

We note that on March 25, 2011, employee filed a Motion to Commute Award with this Commission. We have carefully considered employee's Motion, as well as employer's responsive filings. Because we are convinced that employee's Motion raises issues that will require our remanding this matter to the Division of Workers' Compensation for the taking of additional evidence, and in light of the potential for undue procedural difficulty depending on any future actions taken by the parties, or the appellate courts, pursuant to § 287.495.1 RSMo after the issuance of this final award, we hereby defer our decision on employee's Motion to Commute Award until there is a conclusive and binding award in this matter.

The corrected award and decision of Administrative Law Judge Robert H. House, issued March 3, 2011, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees 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 20th day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Todd Grauberger

Injury No. 01-137020

Dependents: N/A

Employer: Atlas Van Lines, Inc.

Additional Party: N/A

Insurer: Legion Insurance Company

Hearing Date: January 14, 2011

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by:

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: NOVEMBER 19, 2001
5. State location where accident occurred or occupational disease was contracted: JASPER COUNTY, MO
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:
MOVING FURNITURE
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: BACK
14. Nature and extent of any permanent disability: PERMANENT TOTAL DISABILITY
15. Compensation paid to-date for temporary disability: \$44,294.52
16. Value necessary medical aid paid to date by employer/insurer? \$24,534.72

- 17. Value necessary medical aid not furnished by employer/insurer? -0-
- 18. Employee's average weekly wages:
- 19. Weekly compensation rate: \$628.90 / \$329.42
- 20. Method wages computation: AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: -0-

N/A weeks of temporary total disability (or temporary partial disability)

N/A weeks of permanent partial disability from Employer

N/A weeks of disfigurement from Employer

- 22. Second Injury Fund liability: NO

TOTAL: UNDETERMINED

- 23. Future requirements awarded: PERMANENT TOTAL DISABILITY

Said payments to begin SEPTEMBER 9, 2004 and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 PERCENT of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

DAVE CHILDERS
MICHAEL LUTKE

Employee: Todd Grauberger

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AWARD

The parties presented evidence at a final hearing in this matter on January 14, 2011. Claimant appeared in person and through his attorneys, David Childers and Mike Lutke. Employer/insurer appeared through their attorney, Matthew Leonard.

The parties presented only two issues for determination at the hearing.

1. The nature and extent of disability, with claimant alleging permanent total disability benefits. The parties agreed that should I find claimant to be permanently and totally disabled permanent total disability benefits would begin on September 9, 2004.

2. That should I find that claimant was permanently and partially disabled that employer/insurer would be entitled to a credit for the overpayment of temporary total disability benefits in the amount of \$10,781.14 representing 17 1/7 weeks of compensation.

The parties additionally agreed that claimant had an average weekly wage sufficient for the maximum rate of compensation which was \$628.90 for permanent total and temporary total disability benefits and \$329.42 for permanent partial disability benefits. The parties agreed that medical benefits were paid in the amount of \$24,534.72 and that temporary total disability benefits were paid in the amount of \$44,294.52 representing 70 3/7 weeks of compensation.

Only one witness testified at the hearing – claimant, Todd Grauberger. Additionally, testifying by deposition on behalf of claimant were Dr. Shane Bennoch, Dr. Garth Russell, Dr. Dale Halfaker (a neuropsychologist), and vocational rehabilitation counselor, Phillip Eldred. Testifying on behalf of employer/insurer by deposition were Dr. Ted Lennard (two depositions), Dr. Edwin Wolfgram (a psychiatrist), and Bob Hammond, a vocational consultant. Additionally, claimant also introduced into evidence a report of Dr. Ronald Zipper, an orthopedic surgeon. The parties, through a joint exhibit, introduced into evidence claimant's medical records.

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On the date of the hearing claimant was 49 years old. He was born October 17, 1961. During his working life claimant worked as a tractor/trailer driver for moving companies, moving both business and residential items. Claimant mainly operated as an owner/operator moving household items for North American Van Lines and then Atlas Van Lines. He owned his own tractor and would pull the trailer owned by the moving company with which he contracted. He would disassemble items as well as pack and load materials with helpers. He would drive the tractor/trailer to the location where the move was to be completed. With helpers he then would unload and unpack the items that had been transported and reassemble items that had to be disassembled prior to the move. He would lift items anywhere from five pounds to 500 pounds along with his helpers.

On November 19, 2001, while working for employer, claimant bent over to pad a nightstand. He felt immediate pain. He initially treated at Cox Hospital and was referred to Dr. Rethorst who then referred claimant to Dr. Charles Mace, a neurosurgeon. Dr. Mace ultimately performed surgery on claimant's back on December 28, 2001. Dr. Mace performed a right L4-5 laminectomy and microdiscectomy. Claimant had some relief from his symptoms following the surgery. He no longer had the excruciating pain that immediately followed his injury at work, but his symptoms did not completely resolve. Over time, his symptoms worsened. Following surgery, claimant returned to Dr. Rethorst. Later he was referred to Dr. Ted Lennard who treated claimant from October 29, 2002, until May 10, 2004, when Dr. Lennard released claimant. Claimant was provided with prescriptive medications and an epidural injection, neither of which relieved his symptoms. Dr. Lennard released claimant, giving him a rating of 15 percent to the body as a whole and a 50-pound lifting restriction, later changed to 40 pounds. Claimant has received no additional treatment for his injuries since his release by Dr. Lennard.

Claimant continues to have pain in his back radiating through his right leg. Claimant has difficulty sleeping because of his pain. He cannot walk more than 100 yards at a time because of the pain in his back and right leg. He has a numbing and burning sensation going down his right leg, and he limps when he walks. He will take large amounts of over-the-counter medications, including ibuprofen and Aleve in an attempt to relieve his pain. He drives no more than 35 or 40 minutes without stopping. He changes positions on a regular basis, including going to bed and sleeping two to three times a day for up to six hours. Claimant is also depressed because of his physical condition and lack of funds. He believes that there is no job he can perform. Most of the time claimant stays home and sleeps.

There is a disparity of opinion from the experts who treated and examined claimant regarding whether or not he is able to work. Claimant's physical condition as a result his injury involved the L4-5 disk space only and included treatment with a laminectomy and microdiscectomy. However, it is clear from all of the physicians who have examined claimant that he continues to have significant pain in his back, radiating into his leg.

Claimant's examining physicians have rated claimant as follows: Dr. Bennoch rated claimant's back condition as 30 percent to the body as a whole, along with a component of 15 percent to the body as a whole due to depression. Dr. Garth Russell, an orthopedic surgeon, rated claimant's disability as 20 percent to the body as a whole as a result of his back injury and 10

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percent to the body as a whole for depression secondary to the injury. Both Drs. Bennoch and Russell opined that claimant was unemployable and was permanently and totally disabled. Dr. Dale Halfaker, a neuropsychologist, opined that claimant had a permanent partial disability of 14 to 24 percent with a discreet rating of 19 percent to the body as a whole for his psychological impairment which he found to be in the nature of a chronic pain disorder and an adjustment disorder (mainly depression) following his injury. Dr. Russell did not provide specific restrictions but stated that claimant would need the freedom to move about and that claimant could do no bending, lifting or twisting that would cause him discomfort. He believed that technically claimant could do light to moderate work physically but not any work based upon his level of pain. He opined that claimant would need to sit and stand as needed. He further opined that it would not be unreasonable for claimant to "recline" or get off his feet and rest. Dr. Russell found that claimant's back muscles were tight and spastic and continuously constricted. He found that this caused claimant constant pain and limited his movements and ability to function. Dr. Russell found specific objective evidence of claimant's continuing back problems including foot drop and toe or push off, along with chronic muscle spasms, nerve injury scarring, continuous stimulation of the nerve producing spasm, tenderness across the back, loss of motion, a decrease of right leg sensation, and diminished reflexes and hyperactive flexion. All of those problems contributed to Dr. Russell's findings that claimant had failed back syndrome with continuing significant pain caused by significant nerve root scarring at L5-S1 from his injury at work.

Dr. Bennoch also found that claimant had a failed back syndrome and could lift no more than 20 pounds, needed to alternate sitting and standing, shouldn't climb ladder or kneel and was limited in his pushing and pulling activities. Neither Dr. Bennoch nor Dr. Russell believed that claimant could do work on a repetitive or constant basis. Additionally, a report from Dr. Zipper, an orthopedic surgeon, also found that claimant had a failed back. Dr. Lennard stated in his deposition that he would not disagree with Dr. Russell's finding that claimant had a failed back. Nevertheless, Dr. Lennard has rated claimant's disability as a result of his injury at work as 15 percent to the body as a whole. He initially gave claimant a 50-pound weight restriction following a functional capacity evaluation and later modified that restriction to a 40-pound lifting restriction.

Phillip Eldred, a vocational rehabilitation counselor, concluded that claimant could not work based upon restrictions given by Drs. Bennoch and Russell. He believes that claimant's condition would place claimant in the less than sedentary work category. Mr. Eldred found that claimant was neither employable nor placeable in the open market and that he was vocationally permanently and totally disabled based upon the findings, limitations, and restrictions provided by Dr. Bennoch and Dr. Russell. Dr. Russell believed that claimant was capable of doing light to moderate physical activities other than the fact that he had chronic pain and a failed back syndrome.

Dr. Edwin Wolfgram, a psychiatrist, hired by employer/insurer found that claimant had a 3 ½ percent temporary partial psychiatric disability. He believed that claimant was capable of employment but require some rehabilitation. He found that claimant would be limited in terms of heavy lifting but in effect found that he could work. However, Dr. Wolfgram did not have the benefit of reviewing the depositions of Drs. Lennard, Bennoch, or Russell.

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Bob Hammond, a vocational consultant for employer/insurer found that there were jobs that claimant could do based upon a finding that claimant could perform in the medium capacity of work lifting up to 50 pounds. He did not take into consideration the restrictions of Dr. Bennoch or the implicit restrictions of Dr. Russell. Additionally, he did not take into consideration the findings of claimant's chronic pain and failed back.

After reviewing all of the evidence in this case it is clear that the experts who provided testimony for claimant along with the report of Dr. Zipper, concluded that claimant has a failed back with chronic pain, radiating pain into his leg, psychological injury and disability, and the inability to perform any work generally in the work force. It is also clear that the experts who testified for employer/insurer believe that claimant is capable of work and is not permanently and totally disabled although Dr. Lennard has deferred to Dr. Russell in a finding that claimant had a failed back.

Claimant has sought permanent total disability benefits. Total disability, as defined in Section 287.020, ". . . shall mean inability to return to any employment and not merely mean inability to return to employment in which the employee was engaged at the time of the accident." As stated in *Gordon v. Tri-State Motor Transit Co.*, 908 S.W. 2d 849, 853 (Mo.App. S.D. 1995):

The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App.S.D.1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.E.D.1992). Total disability means the "inability to return to any reasonable or normal employment." *Brown v. Treasurer of Mo.*, 795 S.W.2d 479, 483 (Mo.App.E.D.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The pivotal question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d at 367. See also *Thornton v. Haas Bakery*, 858 S.W.2d 831, 834 (Mo.App.E.D.1993); *Kowalski v. M-G Metals and Sales*, 631 S.W.2d at 922.

A claimant's ability to return to any reasonable or normal employment or occupation does not mean claimant's returning to a demeaning and undignified occupation such as selling peanuts, pencils or shoestrings on the street. *Vogle v. Hall Implement Company*, 551 S.W.2d 922 (Mo.App. 1977).

Section 287.220, RSMo, determines the liability of the Second Injury Fund for disability. Applying that statute, I must first determine claimant's disability from the last injury alone and of

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itself. The court in *Vaught v. Vaughns, Incorporated*, 938 S.W.2d 931 (Mo.App. S.D. 1997) stated:

As explained in *Stewart [v. Johnson]*, 398 S.W.2d 850, 854 (Mo.1966), . . . §287.220.1 contemplates that where a partially disabled employee is injured anew and sustains additional disability, the liability of the employer for the new injury “may be at least equal to that provided for permanent total disability.”

I find and conclude that the opinions of two orthopedic surgeons, Drs. Russell and Zipper that claimant had a failed back, as also admitted by Dr. Lennard, result in claimant being permanently and totally disabled. Although he may functionally be able to perform work in the light to medium category, it is clear that based upon his chronic pain and failed back claimant would be unable to perform work on a repetitive or constant basis in the work force at large. That was specifically the finding of Drs. Russell and Bennoch along with the finding of Mr. Eldred, claimant’s vocational rehabilitation counselor. I find that those opinions are more persuasive than the opinions of Mr. Hammond (who failed to take into account claimant’s chronic pain and failed back) and the opinions of Dr. Wolfgram who did not have the benefit of the depositions of Drs. Bennoch, Russell, and Lennard emphasizing claimant’s failed back and the problems resulting therefrom. As found by Dr. Halfaker claimant has a significant psychological disability as a result of his injury at work. It adds to his overall disability. I find Dr. Halfaker’s opinion to be persuasive when considered with the opinions of Drs. Bennoch and Russell. However, I find that claimant’s failed back alone renders him permanently and totally disabled.

I find that as a result of claimant’s accidental injury of November 19, 2001, claimant is permanently and totally disabled. I order that employer/insurer pay to claimant permanent total disability benefits beginning September 9, 2004, and continuing thereafter for claimant’s life at the agreed upon rate of \$628.90 per week.

Claimant’s attorneys are allowed an attorneys’ fee of 25 percent of all amounts awarded herein which shall constitute a lien upon this award.

Date: March 3, 2011

Made by: /s/ Robert H. House

Robert H. House
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson

Naomi Pearson
Division of Workers' Compensation