

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

Injury No.: 98-066010

Employee: Harold L. Gregory
Employer: Detroit Tool & Engineering
Insurer: CNA Insurance Company
Date of Accident: June 19, 1998
Place and County of Accident: Laclede County, 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. Pursuant to section 286.090 RSMo, subsequent to reviewing the evidence and considering the entire record, the Commission modifies the award and decision of the administrative law judge dated October 12, 2006. The award and decision of Administrative Law Judge David L. Zerrer, issued October 12, 2006, is attached and incorporated by this reference.

I. Preliminary Matters

At the hearing before the administrative law judge the parties stipulated to the following issues: (1) whether the accident caused the injuries and disabilities for which benefits are presently being claimed; (2) whether the employee has sustained injuries that will necessitate future medical care and treatment to cure and relieve employee from the effects of the injury; and (3) the nature and extent of permanent disability.

After the case was submitted to the administrative law judge the following benefits were awarded: permanent total disability benefits and future medical care and treatment deemed reasonable and necessary to cure and relieve employee from the effects of the injury sustained.

The employer/insurer filed a timely Application for Review with the Commission alleging that the competent and substantial evidence only supported an award of permanent partial disability, in lieu of permanent total disability; and the competent and substantial evidence did not support an award of future medical care and treatment in behalf of the employee.

II. Facts

Employee was born May 20, 1945; employee attended public school through the tenth grade and received a GED in 1982; and as of the date of the accident, June 19, 1998, employee was married to Crystal Gregory, with four children being born of this marriage all of whom were emancipated as of the date of the accident.

On June 19, 1998, employee sustained injury due to an accident arising out of and in the course of his employment with employer. The principal body parts injured were the lower extremities and sacral area. Employer provided temporary total disability benefits on account of the injury and also provided medical care and treatment in the form of physical therapy, medications, sacral/low back injections as well as a TENS unit.

Due to this accident occurring June 19, 1998, employee treated with multiple physicians. One of the treating physicians was Dr. Lennard, who initially saw employee October 8, 1999. On October 8, 1999, Dr. Lennard administered an L5-S1 facet and left-sided sacroiliac joint injections; Dr. Lennard was of the opinion that employee attained complete relief of pain for approximately eight days due to these injections; subsequently on examination of October 29, 1999, Dr. Lennard prescribed a TENS unit for employee's residual pain which helped significantly; employee followed up with Dr. Lennard on November 22, 1999, undergoing a normal neurological examination

with no signs or symptoms of any lumbar radiculopathy and Dr. Lennard noted employee was quite content with the prescribed TENS unit.

On November 29, 1999, Dr. Lennard issued a final report and rating concerning employee. Dr. Lennard noted that employee had undergone extensive treatment at this point and in the opinion of Dr. Lennard employee had reached maximum medical improvement. The diagnosis of Dr. Lennard was lumbosacral strain, and Dr. Lennard was of the opinion that the employee had sustained 8% permanent partial disability of the body as a whole referable to the lumbar spine resultant of the accident occurring June 19, 1998. Dr. Lennard encouraged employee to continue a home exercise program and recommended continuation of the TENS unit. Dr. Lennard imposed the following restrictions: avoid prolonged bending, may perform occasional lifting of 40 pounds and occasional standing. After being released to return to work by Dr. Lennard employee did so, and remained employed with employer until 2003. Employee returned to work with the employer in the same capacity prior to the accident occurring June 19, 1998, with appropriate accommodations being furnished by the employer throughout his continued employment.

Employee returned to work post-accident and continued to work for employer for approximately four to five years performing his same job duties (Tr. 49-50). Employee admitted that upon returning to his employment he "aggravated" his sacral area on two additional occasions (Tr. 50). Employee further testified that after the accident occurring June 19, 1998, he was able to walk; after the first accident upon returning to work he was able to walk; and after the second accident to the sacral area upon returning to work his condition had reached a point where he was unable to walk and even at times needed the assistance of his wife (Tr. 50).

Subsequent to being released to return to work by Dr. Lennard on November 29, 1999, employee testified that while at work, he was lifting parts weighing approximately 50-60 pounds and injured his sacral area (Tr. 53-54); employee reported the injury to the employer and employer authorized medical care and treatment due to this injury (Tr. 53-54); and employee cannot recall the date of this lifting incident in which he re-injured his sacral area (Tr. 53-54).

Employee further testified that a second subsequent lifting incident occurred after "lifting too much" at work (Tr. 54); employee described it as another "aggravation" (Tr. 54); employee could not recall the date of this second subsequent lifting incident but he did recall that it was attributable to lifting shafts at work (Tr. 54); the injury was reported to the employer with medical treatment being provided and employee never returned to work after the incident of lifting shafts (Tr. 54-55).

When questioned on cross-examination, employee testified that the subsequent two "aggravations" resulted in similar or same symptoms as the symptomatology attributable to the accident occurring June 19, 1998; however, his prior deposition testimony was that the two subsequent lifting incidents at work resulted in a worsening of symptoms and were in fact re-injuries (Tr. 56-57).

Employee did not receive any medical care and treatment subsequent to Dr. Lennard's release of November 29, 1999, until he saw Dr. Mutchler in October and November of 2000. Employee also returned to Dr. Mutchler in August of 2001. The Commission notes a chronology of employee's medical treatment is set forth in the vocational evaluation and report prepared in his behalf by Phillip Eldred, a certified rehabilitation counselor.

Boyd D. Crockett, M.D., testified in behalf of the employee; Dr. Crockett is a board certified physiatrist, and Dr. Crockett evaluated employee on September 7, 2005; Dr. Crockett was of the opinion that due to the accident occurring June 19, 1998, employee was suffering from several sacroiliac problems (Tr. 94-95); that due to these problems he would need ongoing medications (Tr. 95-96); and that employee was permanently totally disabled on account of this injury (Tr. 96).

Dr. Crockett also assigned an impairment rating of 20% permanent partial disability of the body as a whole referable to the sacroiliac problems, and imposed the following restrictions: no lifting, pushing, pulling greater than ten pounds; no prolonged bending, kneeling or stooping; and limited repetitive handling of objects (Tr. 97).

On cross-examination Dr. Crockett admitted that he was not aware of any possible subsequent lifting injuries and/or accidents that employee may have sustained while working for employer (Tr. 103); Dr. Crockett further admitted that he did not obtain a history from employee concerning any additional lifting injuries or flare-ups while

at work and Dr. Crockett admitted that such information regarding any additional injuries could be useful information in order to render his opinions (Tr. 104); Dr. Crockett admitted that his assessment of disability and impairment were necessarily inclusive of all his total conditions at the time he evaluated employee which was September 7, 2005 (Tr.104); and Dr. Crockett admitted that he did not have copies of the medical records of the treating physicians subsequent to the accident occurring June 19, 1998, other than the medical records of Dr. Lennard (Tr. 106-108).

Mr. Phillip Eldred, a certified vocational rehabilitation counselor, evaluated employee and authored a rehabilitation consultation and evaluation report which included his vocational opinion that employee was not presently employable in the open labor market and that employee was permanently totally disabled. Mr. Eldred had employee's history of his two subsequent aggravations and/or injuries at employer, and his testimony, similar to the medical opinion rendered by Dr. Crockett, included employee's total condition as of April 20, 2006, which necessarily included the two additional injuries and respective residuals subsequent to June 19, 1998.

Ms. Gayle Hope, a certified rehabilitation counselor, testified in behalf of the employer. Ms. Hope performed a vocational assessment of employee, Ms. Hope identified transferable skills for the employee and Ms. Hope designated 12 jobs which she was of the opinion employee possessed transferable skills to perform.

Employee returned to Dr. Lennard March 5, 2004, for an independent medical evaluation; Dr. Lennard had not seen employee since November 29, 1999; at the visit of March 5, 2004, employee indicated to Dr. Lennard that he had some flare-ups of his sacral pain on two specific occasions at work; it was Dr. Lennard's understanding that employee continued to work for employer through June 2, 2002; additional history given Dr. Lennard was that on one occasion, while at work, employee was lifting "big, old shafts from a pallet, and had pain in his back"; employee could not remember the date but employee did described it as an increase in his normal baseline back pain; Dr. Lennard received additional history that on another subsequent occasion employee experienced an additional flare-up of pain lifting tooling into a machine on a continual basis; employee was not aware of the exact date but did tell Dr. Lennard that both of these two events were exacerbations of his previous problem.

Dr. Lennard performed a physical examination of employee on March 5, 2004, and had the following findings: employee remained tender to the right side of his lumbar spine; he maintained good motion of the spine; and had a normal neurological exam; Dr. Lennard also reviewed additional medical data and found that employee's low back was normal and his nerve study for the lower extremity was normal; employee also had undergone a normal discogram.

On March 5, 2004, Dr. Lennard supplied the following additional medical opinions: Dr. Lennard was of the opinion that employee suffered a 20% impairment to the body as a whole; and Dr. Lennard apportioned 10% to degenerative changes in employee's lumbar spine and 10% apportioned to the accident occurring June 19, 1998; after reviewing an additional FCE, Dr. Lennard imposed restrictions of not to lift more than ten pounds and to maintain his prior restrictions of bending and stooping. When Dr. Lennard was asked to render opinions concerning the two subsequent events at employer, Dr. Lennard testified that when he saw employee on March 5, 2004, employee was not very clear on any of these specific new injuries, or exacerbations of his typical pain, with the exception of possibly the second or final injury; employee described lifting shafts, and apparently was seen by a doctor and received treatment; and Dr. Lennard opined that it was reasonable that he may very well have sustained a new injury, and subsequently Dr. Lennard apportioned 2% of his 10% previously provided to that second injury; Dr. Lennard did not feel that the third injury warranted any additional impairment. This additional opinion was based on the fact that employee was taken off work by Dr. Mutchler for the lifting incident and it was reasonable that there may very well have been a second injury due to the increased pain and being taken off work.

III. Findings of Fact and Conclusions of Law

Upon its own motion or upon the application of any party of interest, the Commission may end, diminish, or increase the compensation awarded by an administrative law judge in the Commission's final award. *Shaw v. Scott*, 49 S.W.3d 720 (Mo.App. 2001); *Champ v. Doe Run Company*, 84 S.W.3d 493 (Mo.App. 2002).

The ultimate determination of credibility of witnesses rests with the Commission; however, the Commission should

take into consideration the credibility determinations made by an administrative law judge. When reviewing an award entered by the administrative law judge, the Commission is not bound to yield to his or her findings including those relating to credibility, and is authorized to reach its own conclusions. An administrative law judge is no more qualified than the Commission to weigh expert credibility from a transcript or deposition. *Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865 (Mo.App. 2004).

It is the employee's burden to prove the nature and extent of his disability to a reasonable certainty. *Davis v. Brezner*, 380 S.W.2d 523 (Mo.App. 1964); *Matzker v. St. Joseph Minerals*, 740 S.W.2d 362 (Mo.App. 1987). The determination of a specific amount or percentage of disability to be awarded an injured employee is a finding of fact within the unique province of the Commission. *Landers v. Chrysler*, 963 S.W.2d 275 (Mo.App. 1998). In making this determination, the Commission can consider all of the evidence in the record and draw all reasonable inferences from that evidence. *Id.* The Commission is not bound by the percentage estimates of the medical experts and is free to assess a disability either higher or lower of that expressed in the medical or vocational testimony. *Id.*

After reviewing the entire record the Commission finds the amount of compensation awarded by the administrative law judge, i.e., permanent total disability solely attributable to the accident occurring June 19, 1998, was excessive, and not supported by the competent and substantial evidence. The Commission modifies the award as follows: 8% permanent partial disability of the body as a whole referable to the lumbar spine solely attributable to the accident occurring June 19, 1998; and, future medical care and treatment as follows: TENS unit and medical care and treatment in the form of anti-inflammatories deemed reasonable and necessary to cure and relieve employee from the effects of the injury sustained. Consequently the amount of compensation payable for residual permanent partial disability attributable to the accident occurring June 19, 1998, is 32 weeks of permanent partial disability or a lump sum amount of \$8,909.44 (32 weeks x \$278.42).

In reaching this conclusion and modification of the administrative law judge's award, the Commission has principally relied on the treating medical records offered in evidence, and the medical reports and medical opinions of Dr. Lennard. The Commission determines that these medical records and medical opinions are the most credible, persuasive and trustworthy.

A close review of the treating medical records as well as the medical opinions rendered by Dr. Lennard, convinces the Commission the employee sustained an injury principally to the sacral area on account of the accident occurring June 19, 1998, which resulted solely in permanent partial disability, and not permanent total disability. Reasonable and adequate medical care and treatment was rendered employee through October 29, 1999, and at that point it is clear employee had achieved maximum medical improvement, was released and discharged from treatment by Dr. Lennard, and a final rating report was rendered. The final diagnosis was lumbosacral strain.

Employee worked for almost one year prior to seeking any additional medical care and treatment, and although employee was not a good historian as to actual dates, it is clear that employee sustained two additional injuries due to work related accidents, i.e., lifting heavy parts at work on at least two separate occasions, resulting in a worsening of symptoms and changes in condition or pathology, and were distinguishable subsequent intervening events.

Dr. Lennard is the only expert who rendered opinions concerning these separate events, and apportioned any possible disability attributable to these subsequent injuries. Both of the two separate, distinguishable lifting accidents at work, resulted in additional medical treatment, additional lost time, and worsening of symptoms. Employee was unable to return to work after the second lifting injury which apparently occurred in approximately 2002, four years after the accident of June 19, 1998. The medical chronology demonstrates a clear time gap among each of employee's injuries, the worsening of his symptoms, and the need for additional treatment. Employee's evidence in support of his contention that he is permanently and totally disabled on account of the accident occurring June 19, 1998, is actually based upon a consideration of all three injuries in combination, with total disregard to the subsequent incidents.

Dr. Crockett had no information concerning any additional incidents subsequent to June 19, 1998, and since the Commission does find there were two subsequent intervening accidents, which constituted separable compensable injuries, his medical opinion that employee's permanent total disability is attributable solely to the

accident occurring June 19, 1998, cannot legally be afforded any weight or credibility. Employee is required to provide expert medical testimony apportioning the permanent disability attributable to each of the separate injuries. *Plaster v. Dayco Corporation*, 760 S.W.2d 911 (Mo.App. 1988); and *Goleman v. MCI Transporters*, 844 S.W.2d 463 (Mo.App. 1992).

Mr. Eldred rendered an opinion that employee was not able to compete in the open labor market, however, since the opinion of Mr. Eldred was rendered in 2006, it necessarily and admittedly included employee's total condition at that point, i.e., the two subsequent accidents, thus, rendering his vocational opinion unreliable as to determining employee's ability to work or not work solely attributable to the accident occurring June 19, 1998.

In contrast, the medical opinions rendered by Dr. Lennard dated November 29, 1999, March 5, 2004, and July 16, 2004, are reliable, trustworthy and credible. In fact, Dr. Lennard actually treated employee for the accident occurring June 19, 1998, and was in the best position to render credible medical opinions as to the nature and extent of permanent disability and future medical care and treatment, solely attributable to the accident occurring June 19, 1998. The Commission determines that the medical records and medical opinions of Dr. Lennard are by far the most credible, persuasive and trustworthy to determine the issues in dispute on account of the accident occurring June 19, 1998.

In summary, Dr. Lennard was of the opinion that employee had reached maximum medical improvement as of November 29, 1999, on account of the accidental injury occurring June 19, 1998; that he sustained 8% permanent partial disability of the body as a whole referable to the lumbar spine; and he initially imposed restrictions of avoidance of prolonged bending and allowing him to occasionally lift up to 40 pounds, which he subsequently modified to 10 pounds. The Commission finds these opinions extremely reliable since employee had achieved maximum medical improvement on account of the 1998 accident, and obviously this opinion was rendered prior to his subsequent injuries at work.

Dr. Lennard issued two subsequent reports ultimately apportioning his permanent disability as follows: 20% permanent partial disability of the body as a whole referable to the lumbar spine; apportioning 8% permanent partial disability of the body as a whole referable to the lumbar spine on account of the accident occurring June 19, 1998, 2% attributable to employee's subsequent injury sustained approximately October 2000, and the remainder of the rating due to employee's pre-existing condition. Dr. Lennard did not believe that there was any permanent disability attributable to the second lifting incident at work which occurred in approximately 2002.

The Commission also adopts the opinions of Dr. Lennard as to future medical care and treatment, i.e., that employee needs a TENS unit and employee will need anti-inflammatories to cure and relieve him from the effects of the injury occurring June 19, 1998.

IV. Conclusion

Based on the above modifications, employee is awarded the following amounts of permanent partial disability compensation payable: 8% permanent partial disability of the body as a whole referable to the lumbar spine which equates to a lump sum amount of \$8,909.44 ($400 \times 8\% \times \278.42); and medical care and treatment as follows: continued use of TENS unit and anti-inflammatories deemed reasonable and necessary to cure and relieve employee from the effects of the injury sustained June 19, 1998.

The award and decision of Administrative Law Judge David L. Zerrer, dated October 12, 2006, as modified, is attached and incorporated by 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 21st day of December 2007.

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

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 affirmed.

First, it is clear that employee's June 19, 1998, accident was the sole cause of his injuries and resulting disability. As the administrative law judge set forth in his decision, employer did not file an accident report after either of the subsequent incidents. As such, employer treated employee's additional incidents as exacerbations of the June 19, 1998, work injury.

Dr. Crockett provided expert medical and vocational opinions on behalf of employee. Dr. Crockett rated employee's physical impairment as a result of the June 19, 1998, work accident, as 20% of the body as a whole. He testified that employee will need analgesic medications for the remainder of life, as well as annual liver and renal evaluations due to the effects of taking the medications. Dr. Crockett determined that employee's impairment, when considered in conjunction with employee's age, education, restrictions and pain, rendered employee permanently and totally disabled.

Employer's medical expert, Dr. Lennard, also determined that employee suffered 20% impairment of the body as a whole. In his March 5, 2004, medical report, Dr. Lennard allocated 10% of employee's impairment to the work injury of June 19, 1998, and 10% to degenerative changes. Dr. Lennard testified that these degenerative changes were actually present in 1999 when he examined employee. However, his medical report from 1999 is devoid of any mention of those degenerative changes.

On July 16, 2004, over three months after issuing his initial medical report, Dr. Lennard issued a supplemental report. In that report, he still felt that employee suffered 20% impairment of the body as a whole. However, he now allocated 2% of that impairment to a subsequent injury which he thought may have occurred. His change in opinion was based on a medical record from Dr. Multcher from October 2000 indicating that employee was taken off work due to "increased pain." Dr. Lennard further wrote that "[i]f this second incident occurred relative to this time, I do believe that it would be reasonable to believe [employee] sustained a second injury" Such a far reaching and speculative opinion is neither credible nor trustworthy. Therefore, I find the evidence of Dr. Crockett to be more persuasive and logical.

I also do not find employer's vocational expert, Ms. Gayle Hope, to be credible. Ms. Hope did not interview employee or review his medical records. In fact, the only information she reviewed prior to issuing her opinion was the results of a prior vocational report prepared by Jenny Yinger. Thus, Ms. Hope did not have sufficient knowledge or history of employee to form a reliable opinion regarding his employability. Additionally, the jobs she

opined that employee was qualified for were all involved complex drafting and computer use. Clearly, these are jobs that are beyond employee's capabilities due to his age, education and training.

Employee's vocational expert, Dr. Eldred, performed a full evaluation of employee and thoroughly reviewed his medical records. He testified that employee had no transferable skills and was unable to perform his old job based on his current work restrictions. Based on the results of his evaluation, it is his opinion that employee is not employable in the open labor market, and as such, is permanently and totally disabled.

Based on the above, I believe that employee has carried his burden of establishing that he is permanently and totally disabled solely as a result of the June 19, 1998, work accident and injury. Dr. Crockett provided expert medical and vocational evidence that employee suffered 20% impairment of the body as a whole. Dr. Eldred provided further competent and substantial evidence that due to employee's physical impairment, restrictions, age, education and training, employee is unemployable in the open labor market. Therefore, employee is permanently and totally disabled. As such, I would affirm the award of the administrative law judge awarding employee permanent total disability benefits and future medical care.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member