

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

Injury No. 12-051309

Employee: John M. Harrington
Employer: Employer Solutions Staffing
Insurer: Travelers Property Casualty Company of America

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Introduction

The issues before the administrative law judge were: (1) employer's liability for past medical bills; (2) employer's liability for temporary total disability benefits; and (3) employer's liability for permanent partial disability benefits.

In her award, the administrative law judge made the following determinations: (1) employer is liable for \$45,219.74 in past medical bills; (2) employer is liable for \$27,598.82 in temporary total disability benefits for the period from May 21, 2013, through January 15, 2014; (3) employer failed to comply with the temporary/partial award directing it to pay temporary total disability benefits in the amount of \$37,919.39 for the period from June 28, 2012, to May 21, 2013, and under § 287.510 RSMo, its liability for such benefits is doubled with the result that employer owes \$75,838.78 for the period June 28, 2012, to May 21, 2013; and (4) employer is liable for \$51,022.80 in permanent partial disability benefits.

On August 14, 2014, counsel on behalf of employer filed an entry of appearance with the Division of Workers' Compensation (Division); also on that date, employer filed a "Motion to Set Aside Awards and to File Answer to Claim for Compensation Out-of-Time." On August 15, 2014, the administrative law judge entered an Order denying employer's motion of August 14, 2014.

On August 18, 2014, employer filed a timely Application for Review with the Commission alleging: (1) the administrative law judge's denial of employer's motion to set aside awards constituted an abuse of discretion; (2) Missouri jurisdiction is lacking; (3) there is a lack of medical causation, so employer doesn't owe benefits including, but not limited to, medical compensation; (4) the amount of permanent partial disability benefits awarded was excessive; and (5) the awards of temporary total disability and permanent partial disability benefits should be modified, reduced, or offset by workers' compensation benefits paid to employee under a Texas workers' compensation proceeding for the same accident and injuries.

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For the reasons stated below, we modify the award of the administrative law judge referable to the issue of (1) employer's liability for temporary total disability benefits from June 28, 2012, to May 21, 2013; and (2) doubling of temporary total disability benefits under § 287.510 RSMo.

Discussion

Insurance coverage

In her award, the administrative law judge listed employer's insurer as "unknown." On August 19, 2014, employee filed an objection to employer's application for review requesting that we dismiss employer's application on the ground that employer did not post a bond as required under § 287.480.2 RSMo. On September 4, 2014, we issued an order denying employee's request that we dismiss employer's application for review, and directing employer, pursuant to § 287.300 RSMo, to produce and furnish to us within 20 days a copy of its policy of insurance, if any, covering this claim.

On October 7, 2014, employer filed with the Commission a "Second¹ Supplemental² Response of Employer to Commission Order" to which was attached a certified copy of a policy of insurance issued by Travelers Property Casualty Company of America (Travelers) for the policy period May 22, 2012, through May 22, 2013. On October 10, 2014, we issued an order directing all interested parties to show cause within 20 days why the Commission should not admit into evidence the certified copy of the Travelers policy. We sent our October 10, 2014, order to employee, employer, and their respective counsel. Unfortunately, however, we failed to send our October 10, 2014, order to Travelers, owing to inadvertent error on the part of our clerical staff.

On November 6, 2014, we issued an order noting that we did not receive any response to our order of October 10, 2014; admitting into evidence the certified copy of the policy of insurance described above; and finding that on the date of employee's injury, the workers' compensation liability of employer was insured by Travelers. We additionally directed the Secretary to the Commission to add Travelers as a party to this case. However, owing to additional error on the part of our clerical staff, the Secretary to the Commission did not send to Travelers correspondence pertaining to the briefing schedule or oral arguments in this matter.

On January 21, 2015, the Commission heard oral arguments in this matter. Counsel for employee and employer participated. On January 22, 2015, counsel on behalf of Travelers filed an entry of appearance with the Division in this matter; on January 27, 2015, counsel for Travelers provided the Commission with a copy of her entry of appearance. As a result, we provided to counsel for Travelers copies of each of the parties' filings and correspondences, as well as copies of all correspondence to the parties and orders of the Commission in this matter, and temporarily suspended our review of employer's application for review in order to permit Travelers an opportunity to respond.

¹ Employer's earlier "Supplemental Response of Employer to Commission Order" of October 1, 2014, had provided an uncertified copy of an insurance policy.

² Employer's initial "Response of Employer to Commission Order" of September 24, 2014, had provided a copy of an insurance policy which, on its face, purported to cover employer's liability from March 5, 2013, to March 5, 2014, where the date of injury in this matter was June 13, 2012.

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On February 17, 2015, Travelers filed its "Motion for Remand." Therein, Travelers alleged that it was not provided notice of all proceedings as required by statute, and denied that the insurance policy at issue provides workers' compensation coverage in this matter. Travelers requested that the Commission determine that the awards issued by the administrative law judge are void, and remand this matter for additional proceedings including a determination as to whether the Travelers policy provides coverage in this matter. Notably, Travelers's Motion for Remand did not include any prima facie factual allegations supporting its contention that the insurance policy at issue does not provide workers' compensation coverage in this matter.

On February 23, 2015, employee filed "Employee's Response to Travelers Property Casualty Co. of America's Motion for Remand." Therein, employee alleged that his counsel had been informed that Travelers is defending this case under a reservation of rights agreement with employer, and argued that it is inconsistent for Travelers to do so while simultaneously seeking a remand for further proceedings. Employee requested that the Commission deny Travelers's Motion and affirm the administrative law judge's awards.

On February 26, 2015, employer filed "Response of Employer Solution Staffing to Motion for Remand of Travelers Property Casualty Company of America." Therein, employer indicated that it does not oppose a remand to an administrative law judge for resolution of contested insurance coverage issues, as long as such remand is without prejudice to its right to seek Commission review of the prior awards upon resolution of the coverage issues.

On April 10, 2015, the Commission issued an order directing Travelers to provide within 30 days factual allegations sufficient to make a prima facie showing that the workers' compensation liability of employer was not insured by Travelers as of the date of employee's injury. Our order indicated that if Travelers was able to provide such allegations, we would set aside our order of November 6, 2014, temporarily suspend review of employer's application for review, and remand this matter to the Division for an evidentiary hearing regarding the issue of insurance coverage. Our order also stated that if Travelers was not able to provide such allegations, our order of November 6, 2014, would remain in full force and effect, and we would issue, in due course, a final award resolving the issues raised in employer's application for review.

On May 11, 2015, the Commission received "Travelers Property Casualty Company of America's Memorandum in Support of its Motion for Remand." Therein, Travelers admits that a Missouri policy of insurance existed insuring employer for the time period in question, but alleges that the policy does not satisfy § 287.280.1 RSMo, because it does not insure the employer's entire liability under Chapter 287 where it does not insure for extra-territorial injuries. In support of this reading of the policy, Travelers refers us to the Limited Other States Endorsement contained within the policy, and argues employee did not satisfy that endorsement's definition of "Missouri employee."

We appreciate Travelers's forthright admission that the policy of insurance in question was effective on the date of injury in this matter. We are not, however, persuaded by its argument against coverage, for a number of reasons. First, the Limited Other States Endorsement, by its own terms, applies only "in situations when a Missouri employee is

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entitled to workers' compensation benefits of a state other than Missouri." See *Travelers Policy, Missouri Limited Other States Endorsement*, page 1. Obviously, we are not concerned here with the question of employee's entitlement to workers' compensation benefits in a state other than Missouri, so the terms of the Limited Other States Endorsement are irrelevant.

Second, we are of the opinion that any definition of "employee" in this matter must be governed by the definition set forth in § 287.020.1 RSMo, rather than the language of an insurance policy. Indeed, the policy itself states that, "Terms of this insurance that conflict with the workers compensation law are changed by this statement to conform to that law." See *Travelers Policy*, page 2. To the extent the policy would exclude coverage for the injuries at issue in this matter by narrowing the scope of what constitutes a "Missouri employee," the terms of the policy must yield to the definition set forth in § 287.020.1, which employee unquestionably satisfies.³

Finally, the plain language of § 287.280.1 RSMo (which Travelers, ironically, invokes in its Memorandum) precludes Travelers's attempt to limit the scope of coverage by interpretation of the policy's terms. The version of § 287.280.1 applicable to this claim provides, in relevant part, as follows:

Every employer subject to the provisions of this chapter shall, on either an individual or group basis, insure *his entire liability thereunder* ... with some insurance carrier authorized to insure such liability in this state ...

(emphasis added).

Section 287.310.1 RSMo additionally provides, in relevant part, as follows:

Every policy of insurance against liability under this chapter *shall be in accordance with the provisions of this chapter* ...

(emphasis added).

The Missouri courts have construed the foregoing provisions to prevent an insurer from limiting, via the terms of an insurance policy, the scope of coverage for a work injury otherwise falling under Chapter 287:

It was the wise legislative purpose, in the enactment of the compensation law, to see to it that employees subject to the act should be at all times protected in their right to compensation; and to this end there was included the provision that "every employer electing to accept the provisions of this chapter, shall insure his entire liability thereunder ... with some insurance carrier authorized to insure such liability in this state, except that an employer may himself carry the whole or any part of such liability without insurance upon satisfying the commission of his ability so to do." Following

³ Although the administrative law judge did not specifically address the issue, and employer did not identify it as one for our determination on appeal, we are confident the parties cannot seriously harbor any objection to our finding that employee was a "person in the service of any employer" at the time he sustained his injuries. § 287.020.

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this is the further pertinent provision that every policy of insurance against liability under the act shall be in accordance with the provisions of the act, and shall contain an agreement that the insurer accepts all of the provisions of the act, and that the policy may be enforced by any person entitled to any rights under the act as well as by the employer.

Thus it is to be seen that under the positive language of the act, every employer accepting its provisions ... is required to insure his "entire liability thereunder" with some insurance carrier, subject only to the exception that he may himself carry the whole or any part of his liability as a self-insurer "upon satisfying the commission of his ability so to do." There is no other provision in the act for limiting the scope of the insurance coverage, so that unless the employer receives authority from the commission to become a self-insurer as to a part of his operations, he must procure insurance for his "entire liability" with some insurance carrier authorized to insure such liability in this State. Were the law otherwise, difficult and troublesome questions might frequently arise (just as they have arisen in the case at bar) regarding the insurer's liability or nonliability, depending upon technical classification of operations in the policy; uncertainty would inevitably result as to the proper line of demarcation between those employees protected by the policy and those not entitled to its benefits; instead of the act being simple, plain, and prompt in its administration, such a division of insurance would promote complications, doubts, and unavoidable delays; and, in short, the highly salutary and remedial purpose of the act would be materially frustrated, if employers might be insured as to only a part of their employees, and neither carry insurance nor qualify as self-insurers, in respect to the operations at which the others were engaged.

The result is, therefore, that when an insurer undertakes to insure the liability of a particular employer under the act, such insurer must not only agree to accept "all" of the provisions of the act, but must be held to insure the employer's "entire liability thereunder," save in so far as the employer may have received authority from the commission to carry any part of his liability without insurance. This for the reason that the act becomes a part of any insurance policy which is written, and itself determines the scope of the insurer's undertaking in any matter involving the claim of an injured employee, whose right to compensation arises under the act, and not under the policy, which, so far as its construction is concerned, is to be given the declared statutory meaning, even though, as between the insurer and the employer, something different may have been actually intended. As our act is written, an injured employee's rights may not be cut down by any pretended limitation of coverage unless there has been due observance of the requirement relating to self-insurance; and if any question arises over a policy which, on its face, is valid and in force, the matter is not one for the commission to determine, but is to be adjusted between the insurer and the employer in a proceeding adopted to that purpose.

Allen v. Raftery, 237 Mo. App. 542, 551 (Mo. App. 1943)(citations omitted).

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We are not unsympathetic to Travelers's argument that it did not have notice of the proceedings before the Division or the initial proceedings before this Commission. But § 287.300 RSMo unequivocally provides that "[s]ervice on the employer shall be sufficient to give the division or the commission jurisdiction over the person of both the employer and his insurer," and as discussed more fully in the section immediately below, it is uncontested that employer was served with notice of all relevant proceedings before the Division and this Commission. In addition, after we received Travelers's entry of appearance of January 22, 2015, we provided Travelers with notice of all proceedings before this Commission, and also copies of each of the parties' previous filings and correspondences before the Commission, as well as copies of all previous correspondence to the parties and orders of the Commission in this matter, in an effort to give effect to the caveat under § 287.300 that "after appearance by an insurer, the insurer shall be entitled to notice of all proceedings hereunder."

We have also given Travelers an opportunity to provide prima facie factual allegations supporting its position that the policy at issue did not provide coverage; but in light of the foregoing discussion, we deem those allegations insufficient, if proven true, to support a finding that the policy at issue did not insure employer's workers' compensation liability as of June 13, 2012. It bears repeating here that "as between an insurer and an employee, defenses based upon the misconduct or omissions of the employer are of no relevance." *State Farm Fire & Casualty Co. v. Car/Bil, Inc.*, 842 S.W.2d 128, 132 (Mo. App. 1992). As aptly stated by the *Allen* court, "[t]he only function of the commission with respect to the issue of [the insurer's] liability was to determine whether it had issued a policy to the employer which was in force on the date of the accident; and this [as here] being a fact admitted by [the insurer], and there being no pretense that the employer had qualified to carry any portion of his risk as a self-insurer, the commission had no recourse but to find that the employer's liability was fully covered by the policy." 237 Mo. App. at 553.

For the foregoing reasons, Travelers's Motion for Remand is hereby denied. Our order of November 6, 2014, remains in full force and effect. As of the date of injury in this matter, employer's workers' compensation liability was insured by Travelers. We turn now to the merits of employer's appeal of the administrative law judge's award.

Employer's request for a remand to the Division for additional proceedings

We take administrative notice of the records of the Division of Workers' Compensation (Division) in this matter. Those records, along with the transcripts of evidence created at the May 21, 2013, hardship hearing and June 25, 2014, hearing for a final award reveal the following circumstances with respect to employer's failure to defend this claim.

Employee filed his claim for compensation with the Division on July 16, 2012. On July 18, 2012, the Division mailed a copy of employee's claim for compensation to employer at its last known and correct address. Employer did not file an answer. On February 26, 2013, employee filed a request for hearing with the Division. On March 14, 2013, the Division sent a notice of hearing to the parties, including to employer via certified mail. That notice advised that a hearing would take place before the Division on May 21, 2013, at 1736 E. Sunshine, Ste. 610, Springfield, MO 65804. On May 21, 2013, the Division held the hearing referenced in the notice. At that hearing, there was no

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appearance by employer or an insurer on its behalf. On July 2, 2013, the administrative law judge issued a temporary award holding that employer is liable for workers' compensation benefits under the Missouri Workers' Compensation Law; also on that date, the Division sent the temporary award to employer via certified mail.

On February 26, 2014, employee filed a request for hearing with the Division. On March 31, 2014, the Division sent a notice of hearing to the parties, including to employer via certified mail. That notice advised that a hearing would take place before the Division on June 25, 2014, at 1736 E. Sunshine, Ste. 610, Springfield, MO 65804. On June 25, 2014, the Division held the hearing referenced in the notice. Once again, there was no appearance by employer or an insurer on its behalf.

In its brief, employer admits that it timely received each of the notices from the Division referenced above, but alleges that it failed to defend this claim because it mistakenly believed that employee's Missouri claim for compensation was part of a Texas claim for compensation and that its Texas workers' compensation insurer was defending this action on its behalf. Employer requests the Commission to direct the administrative law judge to set aside the temporary and final awards, to permit employer to file an answer to employee's claim for compensation, and to remand this matter to the Division to permit employer a chance to defend the claim and present evidence as to its defenses.

Obviously, to grant the relief employer requests at this stage of the proceedings would constitute a significant imposition upon employee, as well as upon the Division. The appropriate question, then, is whether employer's alleged good faith belief that its Texas insurer was defending this Missouri claim for compensation is sufficient to excuse employer's failure to take any action in connection with the Division's notices, and justify our requiring employee and the Division to start from scratch in terms of adjudicating this matter. We are not persuaded.

It is well-settled in the context of our administrative proceedings that "[f]ailure to properly read [a] notice of hearing is not reasonable." *Guyton v. Div. of Empl. Sec.*, 375 S.W.3d 254, 256 (Mo. App. 2012). It appears to us that even the most cursory review of the Division's notices would make clear to any reader that proceedings were taking place in Missouri, and any lingering confusion as to the meaning of the notices could easily have been remedied by a phone call to the Division or to employee's counsel. Even if there were initially some reasonable and good faith misunderstanding as to whether someone would appear to defend employer at the hardship hearing of May 21, 2013, we are of the opinion that there cannot have been any such mistake thereafter, when employer received a temporary award wherein the administrative law judge made clear there was no appearance by anyone (including any insurance carrier) at the hearing to defend the claim, and also made clear employer was liable to pay workers' compensation benefits in Missouri. Yet, employer continued to take no action until after another hearing and a final award. We conclude that it was unreasonable for employer to fail to defend this claim on the basis of its alleged mistaken belief that these Missouri proceedings were a part of a workers' compensation proceeding in Texas. For this reason, we deny employer's request to remand this matter for any additional proceedings.

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We do wish to note that it appears that employer's present legal counsel and workers' compensation specialist were not personally responsible for employer's failure to defend this matter.

Temporary total disability benefits from June 28, 2012, to May 21, 2013

At the hearing in this matter on May 21, 2013, employee asked the administrative law judge to resolve the issue whether he was entitled to temporary total disability benefits from the employer. The record reflects the following exchange at the outset of the hearing between the administrative law judge and employee's counsel:

THE COURT: The employer is Employer Solutions Staffing. Mr. Beezley, you have evidence that – it's your understanding that they are insured by Texas Mutual Insurance?

MR. BEEZLEY: They are for Texas claims.

...

THE COURT: ... The employee has been receiving approximately \$776 a week as temporary income from the State of Texas or from the Texas – how do we want to say this, Mr. Beezley? We haven't filed a claim down there, so.

MR. BEEZLEY: Well, the payment is made by Texas Mutual Insurance Company.

THE COURT: Okay.

MR. BEEZLEY: On behalf of the employer.

THE COURT: But nothing has been paid under the Missouri Worker's Compensation Law?

MR. BEEZLEY: That's correct.

THE COURT: And those benefits of \$776 a week have been paid since June 27th of 2012.

Transcript of May 21, 2013, hearing, pages 5-7.

As shown above, employee's counsel acceded to the administrative law judge's recital that, at the time of the hardship hearing on May 21, 2013, employer, through Texas Mutual Insurance Company, had paid the weekly amount of \$776.00 to employee since June 27, 2012. Given these circumstances, we deem the record sufficient to support a finding that employee received \$776.00 in weekly workers' compensation benefits from employer's Texas insurer between June 27, 2012, and May 21, 2013. We so find.

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It follows that employer's Missouri liability for unpaid temporary total disability benefits for the 46 and 5/7 weeks between June 28, 2012, and May 21, 2013, is equal to the \$35.73 difference between his weekly Missouri compensation rate of \$811.73 and the \$776.00 weekly payments from employer's Texas insurer. That amount is \$1,669.10. We conclude that employer is liable for \$1,669.10 in temporary total disability benefits for the period from June 28, 2012, to May 21, 2013, and we modify the administrative law judge's award accordingly.

As there is no evidence on this record that employer paid temporary total disability benefits, either pursuant to Texas or Missouri workers' compensation law, after May 21, 2013, we leave undisturbed the administrative law judge's conclusion that employer is liable for \$27,598.82 in temporary total disability benefits for the period May 21, 2013, to January 15, 2014.

Doubling of temporary total disability benefits under § 287.510 RSMo

Section 287.510 RSMo provides, in relevant part, as follows:

In any case a temporary or partial award of compensation may be made, and the same may be modified from time to time to meet the needs of the case, and the same may be kept open until a final award can be made, and if the same be not complied with, the amount equal to the value of compensation ordered and unpaid may be doubled in the final award, if the final award shall be in accordance with the temporary or partial award.

There is no evidence on this record that, at the time of the hearing for the final award in this matter on June 25, 2014, employer had paid employee the additional \$1,669.10 in temporary total disability benefits for which it was liable for the period from June 28, 2012, to May 21, 2013. Given these circumstances, we agree with and adopt as our own the administrative law judge's conclusion that employer failed to comply with the terms of the temporary award of July 2, 2013.

However, because we have modified the administrative law judge's finding that employer was liable for \$37,919.39 in temporary total disability benefits for the period from June 28, 2012, to May 21, 2013, we must also modify her conclusion that employer is liable for an additional \$37,919.39 as a doubling of the amount of ordered and unpaid temporary total disability benefits. Rather, we conclude that the value of the temporary total disability benefits ordered and unpaid is equal to \$1,669.10, and that employer is liable for this additional amount pursuant to § 287.510 as a doubling of the amount of ordered and unpaid compensation, because of its failure to comply with the terms of the temporary award.

Conclusion

We modify the award of the administrative law judge as to the issues of: (1) employer's liability for temporary total disability benefits for the period from June 28, 2012, to May 21, 2013; and (2) doubling of the compensation ordered and unpaid based on employer's failure to comply with the temporary award.

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Employer's liability for temporary total disability benefits for the period from June 28, 2012, to May 21, 2013, is \$1,669.10. Employer is liable under § 287.510 RSMo for an additional \$1,669.10 based on its failure to comply with the temporary award.

The award and decision of administrative law judge Victorine R. Mahon, issued July 30, 2014, is attached hereto and incorporated by this reference to the extent not inconsistent with our findings, conclusions, decision, and modifications herein.

We approve and affirm 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 18th day of June 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: John M. Harrington

Injury No. 12-051309

Dependents: Not Applicable

Employer: Employer Solutions Staffing

Additional Party: Not Applicable

Insurer: Unknown

Hearing Date: June 25, 2014

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

Checked by: VRM/ps

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: June 13, 2012.
5. State location where accident occurred or occupational disease contracted: Fort Worth, Texas.
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? Insurer is unknown.
11. Describe work employee was doing and how accident happened or occupational disease contracted: Employee, while in the scope and course of his employment, was painting an aircraft at the Lockheed Martin plant in Fort Worth, Texas. The ladder, on which he was standing to complete this task, tipped, causing Employee to fall several rungs, injuring his neck and upper back.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Parts of body injured by accident or occupational disease: Neck and upper back.
14. Compensation paid to-date for temporary disability: None.
15. Value necessary medical aid paid to date by employer/insurer? Unknown.

- 16. Value necessary medical aid not furnished by employer/insurer? \$45,219.74.
- 17. Employee's average weekly wages: \$2,000.
- 18. Weekly compensation rate: \$811.73 (TTD) / \$425.19 (PPD).
- 19. Method wages computation: By testimony.

COMPENSATION PAYABLE

- 20. Amount of compensation payable:
 - For unpaid temporary total disability beginning June 28, 2012 to May 21, 2013, a total of 46 and 5/7 weeks, previously awarded: \$37,919.39
 - Penalty for failing to comply with the Temporary/Partial Award: \$37,919.39
 - Additional temporary total disability beginning May 21, 2013 to January 15, 2014 (34 weeks) at the rate of \$811.73: \$27,598.82
 - Unreimbursed Medical Expenses: \$45,219.74
 - Permanent partial disability (30% BAW) at the rate of \$425.19 per week (120 weeks x \$425.19): \$51,022.80

TOTAL: \$199,680.14

- 21. Second Injury Fund liability: Not applicable.
- 22. Future requirements awarded: None.

This Award 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: Robert T. Beezley.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John M. Harrington

Injury No. 12-051309

Dependents: Not Applicable

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Employer Solutions Staffing

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Not Applicable

Insurer: Unknown

Hearing Date: June 25, 2014

Checked by: VRM/ps

INTRODUCTION

On May 21, 2013, the undersigned Administrative Law Judge conducted a hardship hearing, at which neither Employer (Employer Solutions Staffing), nor any insurer, appeared. As a consequence of that hearing and the evidence received on behalf of John M. Harrington (Claimant), the Administrative Law Judge issued a Temporary or Partial Award on July 2, 2013, directing that Employer pay Claimant temporary total disability and provide medical treatment. The record remained open and subject to modification.

On June 25, 2014, the undersigned Administrative Law Judge conducted a final hearing in Springfield, Greene County, Missouri, at the request of Claimant, who again appeared in person and with his attorney Robert T. Beezley. Despite certified notice to the last known address, Employer again failed to appear. There also was no appearance on behalf of any insurer. The hearing proceeded with the receipt of Claimant's evidence. The record from the hardship hearing, including exhibits and testimony, is incorporated and made a part of the whole record. The findings and conclusions of law contained in the Temporary or Partial Award previously issued in this case are incorporated in this Final Award.

EXHIBITS¹

The following exhibits were offered and admitted into evidence:

Medical Records

- A. Concentra Medical Center – Dr. Dr. Roy Kreusel (Texas)
- B. Concentra Medical Center – Physical Therapy (Texas)
- C. Concentra Medical Center – Physical Therapy (Missouri)
- D. Springfield Neurological and Spine Institute – Dr. Woodward (Missouri)
- E. Concentra Medical Center – Dr. Anjum Qureshi (Missouri)
- F. Physical Therapy Care
- G. Lake Regional Occupational Medicine – Dr. Pauline Abbott
- H. Springfield Neurological and Spine Institute

¹ Exhibits A through N and Court Exhibits 1 through 3, were received into evidence at the hardship hearing on May 21, 2013.

- I. Springfield Neurological and Spine Institute
- J. Peak Performance/Clay Therapy
- K. Springfield Neurological and Spine Institute
- L. Cox Medical Center

Medical Bills

- M. Cox Medical Center
- N. Springfield Neurological and Spine Institute

Court Exhibits

- Exhibit 1 – Certified Mail Receipt dated March 19, 2013 and Notice of Hearing
- Exhibit 2 – Claim for Compensation filed July 16, 2012
- Exhibit 3 – Notice of the Claim for Compensation mailed July 18, 2012
- Exhibit 4 – Notice of Hearing to John M. Harrington (Claimant) - returned
- Exhibit 5 – Certified Mail Receipts

ISSUES

- 1. Did Employer have notice of the hearing?
- 2. Is Claimant entitled to additional temporary total disability under Missouri Workers' Compensation?
- 3. Is Claimant entitled to a doubling of past temporary total disability awarded?
- 4. Is Claimant entitled to payment of medical bills pursuant to § 287.140 RSMo?
- 5. What is the nature and extent of any permanent partial disability?

FINDINGS OF FACT

Based on Claimant's credible testimony and the exhibits admitted at hearings, I find the following:

Medical Treatment and Temporary Total Disability

Following the hardship hearing on May 21, 2013, Claimant came under the care and treatment Mark Crabtree, M.D., a board certified neurosurgeon, who practices with the Springfield Neurological and Spine Institute (SNSI) in Springfield, Missouri. Dr. Crabtree recommended a cervical discectomy and fusion to treat a herniated disc in Claimant's neck. On July 3, 2013, Claimant underwent an anterior cervical discectomy and anterior plating with the use of a cage. Dr. Crabtree performed the recommended surgery at Cox Medical Center in Springfield, Missouri.

Subsequent to the surgery, Claimant engaged in several prescribed weeks of physical therapy at Peak Performance in Springfield, Missouri. Claimant remained under Dr. Crabtree's care until the end of 2013. He thereafter saw Dr. Ted Lennard for further care and treatment with respect to the area of the back that still was symptomatic. Claimant was unable to continue treating with Dr. Lennard due to a lack of funds. Dr. Crabtree released Claimant to return to work effective January 15, 2014. This is Claimant's date of maximum medical improvement.

On February 4, 2014, Claimant obtained a job at Mercy Health Systems in Springfield, Missouri. His work entailed the preparation of surgical packs. The job duties were repetitive in nature, and Claimant eventually could not keep up with the pace of work due to his physical condition. Because his productivity decreased, Mercy discharged Claimant effective June 13, 2014. Claimant has not worked since that time. Claimant also was not able to work between June 28, 2012 and January 15, 2014. No evidence suggests that Employer provided any temporary total disability under the Missouri Workers' Compensation Law.

Current Condition

While the medical records indicate that Claimant's surgery successfully addressed much of his problem, he continues to have pain in his neck, shoulders, and into the arms. Every day he suffers pain as much as 5 or 6 on a 10-point scale. He is limited with respect to postural activities. He can stand and sit comfortably for about an hour, but is unable to walk for more than a block. His lifting is limited to 10 or 15 pounds. These limitations inhibit his ability to enjoy everyday activities. He must take more than a day to mow his lawn, completing the task in increments. Trimming his yard causes significant pain. He no longer takes his family to the lake or to amusement parks because of his physical discomfort. Claimant has not found work since he lost his job at Mercy Health.

Medical Bills

Although Employer provided some medical care, Claimant identified two outstanding bills related to his surgery. These were from Cox Medical Center for \$30,562.27 (Exhibit M) and from Dr. Crabtree and SNSI (Exhibit N) for \$14,657.47). Claimant incurred these bills as a direct result of the services needed to treat his work-related injury. These bills have not been paid by any source. There is no evidence that either health care provider had written off the bills.

Permanent Partial Disability

While Claimant has not obtained a specific rating from a physician, based on the medical records and Claimant's credible testimony, I find that that he suffers a 30 percent permanent partial disability to the body as a whole due to the work related injury. This takes into consideration the pain in his neck, shoulders, arms, and lower levels of the back, his lifting limitations, and postural limitations.

Notice of Hearing

The Missouri Division of Workers' Compensation sent notice of the final hearing by certified mail to Claimant, his counsel, and to Employer Solutions Staffing at Employer Solutions Staffing, 7301 OHMS Lane, Suite 405, Edina, Minnesota, 55439 (Court Exhibit 5). The notices, dated March 31, 2014, were mailed on April 2, 2014, as evidenced by the United States Post Office mark. The date of hearing was Jun 25, 2014. Claimant's notice was returned to the Division because he had moved and the notice could not be forwarded (Exhibit 4). Still, Claimant appeared with his counsel. The notice to Employer by certified mail on April 2, 2014, was not returned. Based on the only evidence in the record and the reasonable presumptions from that evidence, I find that the Division forwarded the notice of the Final Hearing by certified mail to Employer's last known address in time for Employer to participate in the hearing.

CONCLUSIONS OF LAW

Notice of a hearing is properly given when sent by certified mail to a person or entity at the last known address in time for the person or entity to act thereon. § 287.520 RSMo 2000. As reflected in Court Exhibits 4 and 5, the Division forwarded notice of the hearing to all parties by certified mail more than two months prior to the final hearing. Employer's notice was not returned as undeliverable. No excuse appears from the record for Employer's absence. Notice complied with the statutory directive.

Medical Treatment

Section 287.140, RSMo, requires Employer to provide medical treatment as reasonably may be required to cure and relieve an employee from the effects of the work-related injury. To "cure and relieve" means treatment that will give comfort, even though restoration to soundness is beyond avail. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. banc 2003). Having reviewed the medical records and heard Claimant's testimony, I find and conclude that Claimant credibly demonstrated the need for additional medical treatment to cure or relieve the effects of his work injury. Such medical treatment included the surgery performed at Cox Medical Center by Dr. Crabtree, a board certified neurosurgeon. *See Downing v. McDonald's Sirloin Stockade*, 418 S.W.3d 526 (Mo. App. S.D. 2014) (affirming award of past medical expenses for needed surgery after the employer had refused authorization). Employer shall pay to Claimant \$30,562.27, which is the amount of the outstanding bill from Cox Medical Center (Exhibit M). Employer also shall pay to Claimant \$14,657.47, which is the physicians' bill from Springfield Neurological and Spine Institute (Exhibit N). These two medical bills total \$45,219.74.

Temporary Total Disability

Claimant performed no work after the date of hardship hearing on May 21, 2013 until his release from Dr. Crabtree and date of maximum medical improvement effective January 15, 2014, a total of 34 weeks. There is no evidence that Claimant was capable of any work during this period. Employer shall pay to Claimant 34 weeks of temporary total disability at the weekly temporary total disability benefit rate of \$811.73, totaling \$27,598.82.

Additionally, Employer failed to comply with the Temporary/Partial Award directing Employer to pay temporary total disability in the amount of \$37,919.39, for the period of June 28, 2012 to May 21, 2013. Section 287.510 RSMo 2000, authorizes an Administrative Law Judge to double amounts previously awarded in the Temporary/Partial Award for noncompliance when the Final Award is in compliance with the Temporary/Partial Award. Because Employer has failed to comply with the Temporary/Partial Award of July 2, 2013, and has presented no defense or explanation for its noncompliance, its liability for temporary total disability for the period of June 28, 2012 to May 21, 2013 is doubled. For the period June 28, 2012 to May 21, 2013, Employer now owes Claimant \$75,838.78.

Permanent Partial Disability

Claimant's testimony clearly demonstrates that he sustained a significant permanent partial disability from the work accident of June 13, 2012. Permanent partial disability "means a disability that is permanent in nature and partial in degree...." § 287.190(6) RSMo 2000. While Claimant has not provided a physician's rating, the nature and extent of disability is within the province of the fact finder. *Stewart v. Treasurer*, 419 S.W.3d 915 (Mo. App. S.D. 2014). Based on Claimant's credible testimony regarding his restrictions, his problems keeping pace at work, and the medical records, Claimant is entitled to 30

percent permanent partial disability to the body as a whole. Employer shall pay Claimant \$51,022.80 representing 120 weeks of permanent partial disability at the maximum weekly permanent partial disability benefit rate of \$425.19.

SUMMARY

Employer owes Claimant shall \$199,680.14 in workers' compensation benefits. This includes the amount originally awarded for temporary total disability in the Temporary/Partial Award (\$37,919.39), the doubling penalty for failing to comply with that Award (\$37,919.39), temporary total disability following the May 21, 2013 hardship hearing to the date Claimant reached maximum medical improvement (\$27,598.82), unpaid related medical bills (\$45,219.74), and permanent partial disability (\$51,022.80).

Robert T. Beezley shall have a lien of 25 percent of the amounts awarded as a reasonable fee for necessary legal services provided to Claimant.

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation