

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

Injury No.: 98-134295

Employee: Kenneth Hufker
Employer: Classic Woodworking, Inc.
Insurer: Zurich American Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: October 27, 1998
Place and County of Accident: St. Louis, 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 February 8, 2008. The award and decision of Administrative Law Judge Kathleen M. Hart, issued February 8, 2008, 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 19th day of August 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Kenneth Hufker

Injury No.: 98-134295

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Classic Woodworking Inc.

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

Additional Party: Second Injury Fund (open)

Insurer: Zurich American Insurance Company

Hearing Date: November 15, 2007

Checked by: KMH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - 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
 - Date of accident or onset of occupational disease: October 27, 1998
 - State location where accident occurred or occupational disease was contracted: St. Louis
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
 - 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:
Claimant was struck by wall panels while loading a truck.
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: head, neck, back, left upper extremity
 - Nature and extent of any permanent disability: 45% body as a whole

15. Compensation paid to-date for temporary disability: \$900.00
16. Value necessary medical aid paid to date by employer/insurer? \$144,257.26

Employee: Kenneth Hufker

Injury No.: 98-134295

17. Value necessary medical aid not furnished by employer/insurer? 14,340.50

- Employee's average weekly wages: \$861.55

19. Weekly compensation rate: \$562.67/\$294.73

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$14,340.50
180 weeks of permanent partial disability from Employer	\$53,051.40

22. Second Injury Fund liability: Open

Total: \$67,391.90

23. Future requirements awarded: pursuant to award

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

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

David Jerome

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kenneth Hufker

Injury No.: 98-134295

Dependents: n/a

Before the

Employer: Classic Woodworking

Additional Party: Second Injury Fund (open)

Insurer: Zurich American Insurance Company

**Division of Workers'
Compensation**

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

Checked by: KMH

A hearing was held on the above captioned matter November 15, 2007. Kenneth Hufker (Claimant) was represented by attorney David Jerome. Classic Woodworking (Employer) was represented by attorney Chris Patt. The Second Injury Fund was left open. The parties requested the record remain open until December 6, 2007, for submission of Emergency Room records. No records were submitted, and the record was closed December 6, 2007.

STIPULATIONS

The parties stipulated to the following:

- Claimant was injured by accident October 27, 1998, while in the course and scope of his employment for Employer. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
- Employer's liability was fully insured by Zurich American Insurance Company. Employer had notice of the injury and a claim for compensation was timely filed.
- Claimant's average weekly wage was \$861.55 yielding TTD and PPD rates of \$562.67 and \$294.73. Claimant has received \$900.00 in TTD and \$144,257.26 in medical benefits.

ISSUES

The parties stipulated the issues to be resolved are as follows:

- Whether Claimant is entitled to future medical benefits.
- Whether the future medical care is medically and causally related to the work injury.
- Liability for past medical expenses of \$12,623.00 and \$1,717.50 as outlined in Exhibit N. Other medical bills in that exhibit are not in dispute.
- The nature and extent of Claimant's permanent partial disability.
- Liability of Insurer after their coverage ended June 22, 1999.

FINDINGS OF FACT

Based upon the competent and substantial evidence, I find:

- Claimant is a 47 year-old male who has worked full-time for Employer since 1979. Employer

manufactures high end residential and commercial furniture.

- Claimant has been a foreman since before his work injury. His duties are divided evenly among supervisory work, shop work and sales calls. As a supervisor he handles the paperwork associated with running the business and ordering parts. His work in the shop involves lifting and moving furniture, spraying and staining products, and loading trucks. He works in the shop almost daily. He goes out on sales calls several times a week.
- On October 27, 1998, Claimant was in the loading area of the shop with two trainees. The three men were loading a cart of wall panels onto a lift gate to lift them up into a truck. The panels weighed about 1200 pounds. As the gate rose, the panels slid backwards and fell several feet crushing Claimant to the ground. The panels fell on Claimant's left arm and head, and pinned him to the ground.
- Claimant was rushed to St. Anthony's Emergency Room where he complained of pain in his head, neck, mid back, low back, left arm and wrist. Claimant was diagnosed with a fracture in his thoracic spine and a herniated disc in his cervical spine.
- Employer authorized treatment with Dr. Pruitt. He diagnosed a compression fracture of 15-20% at the T5 level. After Claimant's hand complaints resolved, Dr. Pruitt referred Claimant to Dr. Albanna for treatment of his neck and back. He diagnosed a T5 fracture and a mild to moderate disc herniation at the C6-C7 level. Dr. Albanna ordered MRIs and prescribed a TENS unit and physical therapy. The therapy provided temporary relief.
- Due to Claimant's ongoing pain, Dr. Albanna prescribed pain management with Dr. Feinberg. The pain management seemed to help, so Dr. Albanna recommended Claimant continue pain management as a way to avoid neck surgery, which would likely be a complete fusion.
- Claimant began pain management with Dr. Feinberg in 1999. His treatment consisted of nerve blocks, trigger point injections, physical therapy, chiropractic care and medications directed to relieve Claimant's neck, thoracic spine, and low back pain. Claimant has continued this treatment with Dr. Feinberg and continues to take muscle relaxers and Tylenol. This treatment has helped control Claimant's pain levels and enabled him to continue working. With injections, his pain level is between a four and a six out of ten. Without them, his pain reaches a six to ten, and he increases the amount of Tylenol and muscle relaxers he takes.
- In May and June of 2000, Insurer transferred Claimant's treatment to Western Anesthesia Pain Management where he was treated with the same type of injections as provided by Dr. Feinberg. Claimant testified he did not obtain the same level of relief from this treatment, and Employer/Insurer authorized treatment to continue with Dr. Feinberg.

Claimant underwent a functional capacity evaluation in August 2001. This showed he could work at the medium physical demand level, but his job requires heavy physical demand level.

- Claimant testified he did not get the injections on a regular basis in 2001 or 2002. This lapse in treatment appears to be the result of an unrelated medical condition. During that time, he missed work and was not able to work in the shop as much as he usually did. His body became stiff and sore, and he had more frequent headaches.
- In 2006, Insurer suspended all treatment with Dr. Feinberg and sent Claimant to Dr. Wayne. Claimant's supervisor and Vice President, Laurie Mullen, wrote Insurer requesting they continue to authorize treatment with Dr. Feinberg. Insurer continues to deny further treatment with Dr. Feinberg.
- Dr. Wayne, employer's expert, examined Claimant in May 2006. He also diagnosed a T5 fracture and a C6-7 herniated disc. He found the majority of Claimant's ongoing problems were the result of his compression fracture. Dr. Wayne opined the fracture led to chronic, persistent pain in the thoracic distribution which set in motion a myofascial dysfunction in that region. He noted this dysfunction can be a very chronic condition which can require periodic interventional management. He recommended Claimant continue his exercise program and get trigger point injections every three to four months. He also noted it is common to go through cycles of flare-up and remission with myofascial dysfunction regardless of the activity of the patient.
- Claimant continued to see Dr. Wayne for injections. He encouraged Claimant to self treat so he would not be reliant on long-term, frequent injections. Claimant testified these injections did not last as long as the injections he received from Dr. Feinberg. Claimant testified Dr. Wayne recommended 1 -1 ½ years more of injections and medications at the time of his May 2006 examination. None has been authorized. Claimant has requested additional treatment which has not been authorized.
- Since May 2006, Claimant has continued to treat with Dr. Feinberg through his group health insurance. He has outstanding medical bills from Dr. Feinberg and Frontenac Surgery Center for this treatment. Some of this treatment has been paid by his group carrier. Claimant last saw Dr. Feinberg for an injection in October 2007. He continues to receive regular injections and takes medications as prescribed by Dr. Feinberg. Without the injections, Claimant believes he would not be able to use the tools in the shop at work.
- Claimant testified Dr. Albanna and Dr. Kennedy told him the only other treatment option is very invasive and is a neck fusion. Dr. Kennedy also recommended Claimant continue with injections instead of surgery. Claimant wants to continue receiving injections instead of surgery.
- Claimant has had no injuries to his cervical or thoracic spine before or since 1998. Claimant had a low

back injury in 1984 which settled for 11 ½ % of his low back. His treatment consisted of approximately 20 chiropractic visits. His complaints from this 1984 injury largely resolved after this treatment. After his case settled, Claimant had no other treatment or injuries to his low back until his 1998 work injury.

- Claimant continues to have a burning sensation in the back of his neck which wakes him up nightly. He has an intermittent burning sensation that radiates into his upper arm and right elbow. He has spasms in his neck which cause an increase in pain and difficulty lifting. Injections decrease the frequency of his spasms and burning. Claimant has headaches two to three days a week, which are relieved by muscle relaxers, ice packs, and rest. Claimant testified his right shoulder is higher than the left because of the spasms. If he lowers his right shoulder, he experiences pain. These complaints make it difficult for Claimant to lift at work. He has difficulty spraying wide conference tables because he can't reach across the table. Repetitive sanding and staining are also difficult.
- Claimant has a constant stabbing sensation in his thoracic spine. When he is ready for an injection and his pain level is high, he has difficulty taking a deep breath and difficulty using some of the machines in the shop.
- Claimant has a burning sensation in his left buttock and into his leg. This is not as frequent as his neck complaints. He has occasional tightness in his low back. He has no complaints in his left hand and arm.
- Claimant continues to work full-time for Employer as a foreman. His work duties have not changed. Given his seniority, he is able to modify his activities when his pain is at a higher level.
- Dr. Feinberg diagnosed Claimant with chronic myofascial pain syndrome as a result of compensating for the fracture and herniated disc. He opined surgery is not the best option for Claimant, and since Claimant is continuing to work in a high physical demand job, he needs long-term frequent injections. He believes Claimant has been able to continue working because of his ongoing injection treatments. If Claimant stopped this treatment, he will have a significant deterioration in his ability to perform his work and will probably require surgery. If Claimant stopped his physical work, he would be able to maintain a low pain level and his injection treatment may end.
- Dr. Volarich, Claimant's expert, found the work injury was a substantial factor in causing Claimant's condition and need for treatment. He rated Claimant's disability and found Claimant was at his maximum medical improvement as long as he continues to get the injections. He opined the treatment provided by Dr. Feinberg was reasonable and necessary to cure and relieve Claimant of the effects of his work injury, and it is reasonable to continue those treatments. Without the injections, Claimant would need more oral medication, possibly narcotics. This is not advisable as these medications can cause a change in mental status, and Claimant works around heavy equipment and other people.

- Dr. Wayne, Employer's expert, testified myofascial dysfunction can be a chronic condition and can be too severe for a patient to manage on his own. Trigger point injections are beneficial for this problem. The duration a patient needs the injections depends on his level of symptoms. In treating Claimant, Dr. Wayne's goal was to taper him off the injections. He testified if Claimant got to a point he was having difficulty maintaining his normal functioning, trigger point injections spaced out over a reasonable time period would be helpful. He opined Claimant's myofascial disorder will go through stages of exacerbation and regression for the rest of his life, and this cycle depends of the level of Claimant's activity.
- Claimant is credible. Despite his significant injury, he missed very little time from work. Each of the doctors commended Claimant for pushing himself physically in order to stay employed. He is not a complaint-oriented person and is a very credible, hard working gentleman.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

- Claimant is entitled to additional medical treatment which is medically and causally related to his 1998 work injury.

Section 287.140.1 "entitles the worker to medical treatment as may reasonably be required *to cure and relieve from the effects of the injury.*" *Ford v. Wal-Mart Associates, Inc.*, 155 S.W.3d 824, 828 (Mo.App. E.D. 2005) (citations omitted). It is sufficient to award future medical benefits if the claimant shows by reasonable probability that he is in need of additional medical treatment by reason of his work-related accident. *Bock v. Broadway Ford Truck Sales, Inc.*, 55 S.W.3d 427, 437 (Mo.App. E.D. 2001).

Each of the medical experts agree Claimant still needs pain medications. In their proposed award, Employer argues the need for this ongoing treatment is due to Claimant's ongoing exposure to additional trauma at work and not to his initial work injury. They argue they are not liable for this ongoing exposure since their coverage ended in 1999. There is no scientific evidence to support this contention. In fact, even Employer's physicians argue to the opposite conclusion.

In support of their argument that Claimant is being exposed to new trauma at work, Employer points to Claimant's testimony that his job duties make his neck pain worse and that the injections wear off faster if he is more physically active. Dr. Feinberg, one of the authorized treating physicians, explained that while work activities can aggravate the condition, the need for ongoing medications is solely due to the work injury which caused the Claimant's abnormality and led to his symptoms. Dr. Volarich also opined the work injury was a substantial factor in causing these diagnoses and the need for the ongoing treatment.

Employer further argues Dr. Feinberg testified the 2004 and 2005 cervical MRIs showed a worsening of the neck condition. However, Dr. Feinberg also explained the 2004 MRI simply showed a broad based protrusion at C6-7. The 2005 MRI noted "degenerative change C6-7 with a small but focal protrusion". Dr. Feinberg testified the normal process of further degeneration since the condition "has been started" accounts for this change or worsening. The more a person does, the more rapid the rate of change would be. Dr. Volarich, who is board certified in Nuclear

Medicine, a sub-specialty of radiology, testified the updated MRIs show a smaller herniation, and therefore, the injection treatment was helping.

The record reveals no new accident that caused an increase in symptoms after Employer's coverage ended in 1999. Claimant credibly testified the waxing and waning of his symptoms has existed since 1998. Dr. Feinberg's medical records corroborate this testimony. Dr. Feinberg explained the waxing and waning of symptoms are temporary exacerbations of the underlying condition caused by the structural abnormalities caused by the initial injury. All of the treatment he has rendered stemmed from the work injury. Dr. Volarich and Dr. Wayne agreed Claimant's symptoms would go through cycles of flare-ups regardless of his activity.

Each doctor found Claimant had reached his maximum medical improvement (MMI). However, an award of future care to cure or relieve, per section 287.140 RSMo, is not necessarily inconsistent with a finding that the claimant may have achieved maximum medical improvement. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271 (Mo.App. S.D. 1996).

Drs. Volarich and Feinberg found Claimant had reached MMI, but he will continue to need pain management. Dr. Volarich explained MMI simply means Claimant has reached a plateau and is as good as he is going to get as long as he gets pain management. He has chronic myofascial pain that gets better and worse. Dr. Wayne also diagnosed a chronic myofascial pain disorder which will go through stages of exacerbation and regression for the rest of Claimant's life. His symptoms will come and go depending upon the level of activity.

As late as May 2006, Dr. Wayne, Employer's second expert physician, found that while Dr. Kennedy had found Claimant at MMI in 2001, Claimant still needed treatment which was related to the 1998 injury. He again stated it is common to go through cycles of flare-up and remission with myofascial disorder regardless of the type of activity. While Claimant's fracture may have healed, Dr. Wayne opined Claimant's compression fracture led to chronic, persistent pain in the thoracic distribution which set in motion a myofascial dysfunction in that region. This means the muscles and tendons in the spine and shoulder blade have increased tightness and spasming, and a shortness of muscle fibers which can affect body mechanics and how he moves his arm and shoulder blade. This can cause chronic pain and can be too severe to manage on his own. He opined injections would be beneficial and the duration of the need for injections depends on the level of symptoms. This is a very chronic condition, and there are times the symptoms become too severe and periodic interventional management is necessary.

Dr. Wayne preferred to taper Claimant off the injection therapy, but he agreed the injections are a reasonable course of treatment. Claimant has a disorder that will go through stages of exacerbation and regression for the rest of Claimant's life, and that cycle is contingent upon the level of activity.

Employer argues it is not reasonable to find Claimant still needs treatment nine years after his "routine" injury, and ordering treatment would further overburden the workers' compensation system and increase insurance premiums. Nevertheless, this is no more than a bold assertion not supported by any evidence and completely devoid of expert testimony. They characterize his injuries as a compression fracture and cervical strain, "routine injuries". This characterization is plainly incorrect, is certainly at odds with Employer's own doctor's testimony, and betrays a meanness of spirit that characterizes the handling of this claim to the point this hearing was necessary. Claimant's injuries are not "routine". He has been diagnosed by Dr. Wayne, Dr. Feinberg, and Dr. Volarich with a herniated disc in his neck and a compression fracture.

Employer's argument boils down to concluding if Claimant had simply stopped working for Employer and worked in a more sedentary capacity, there could have been an end point to his treatment, at which point I find Claimant would likely be permanently and totally disabled. Each of the medical experts agree the need for ongoing injections is largely related to Claimant's ongoing heavy physical demand work. While Claimant's continued work may have extended his need for treatment, the law does not require Claimant to change jobs or become inert in order to relieve Insurer of their obligation to provide treatment. Claimant has worked for Employer for nearly 30 years. He is a hard working, dedicated employee. He should be commended, not penalized, for continuing to work. He should not be forced to take a lighter demand job because Insurer is tired of providing treatment.

I find Claimant is in need of additional treatment which is medically and causally related to his 1998 work injury. Section 287.140.1 (RSMo 2000) allows Employer to select an authorized treating physician. Employer authorized treatment with Dr. Feinberg in 1999. There has been no evidence presented that continuing treatment with Dr. Feinberg threatens the life, health, or recovery of Claimant. Therefore, pursuant to Section 287.140.2, Dr. Feinberg remains the authorized treating physician. Employer is ordered to provide continuing treatment at the direction of the authorized treating physician, Dr. Feinberg.

- Employer is responsible for unpaid medical bills of \$14,340.50.

The parties stipulated Claimant has outstanding bills from Frontenac Surgery Center of \$12,623.00 and from Injury Specialists of \$1,717.50. Claimant testified these bills are for treatment with Dr. Feinberg after Employer discontinued treatment in 2006 based on Dr. Wayne's report. Dr. Feinberg and Dr. Volarich testified this treatment was reasonable and necessary to cure and relieve Claimant of the effects of his injury. Dr. Wayne also testified with Claimant's chronic condition, there may be times this type of medical intervention is necessary.

"In *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. banc 1989), our Supreme Court stated that "when [employee] testimony accompanies the bills, which the employee identifies as being related to and the product of her injury, and when the bills relate to the *professional services rendered as shown by the medical records in evidence*, a sufficient factual basis exists for the commission to award compensation." *Id.* at 111-12[7] (emphasis added)." *Meyer v. Superior Insulating Tape*, 882 S.W.2d 735, 738 (Mo.App. E.D. 1994)(overruled in part by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo.Banc 2003)).

I find Claimant has met his burden and proven the bills in question are related to his work injury. Employer is hereby ordered to pay these bills.

3. Claimant has sustained 45% PPD to his head, cervical, thoracic, and lumbar spine.

A permanent partial disability award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App.1991)(overruled in part by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo.Banc 2003)). With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770,773 (Mo.App. 1983) (overruled in part by *Hampton*).

Based on the evidence and the credible testimony of Claimant, I find he has sustained 45% PPD to his body as a whole regarding his head, cervical, thoracic, and lumbar spine and is entitled to \$53,051.40 in compensation.

CONCLUSION

Claimant is entitled to payment of the medical bills outlined in Exhibit N from Injury Specialists and Frontenac Surgery Center. He has sustained PPD of 45% of the body as a whole. Claimant is entitled to ongoing medical treatment, and this treatment relates to his 1998 work injury. It is possible Claimant's condition will worsen during the life of this award at which point a motion for change of condition would be appropriate. The remaining issue regarding the Insurer's coverage period is moot.

This is a final award with medical benefits left open and subject to future benefits.

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffery W. Buker
Director
Division of Workers' Compensation

Kenneth Hufker v. Classic Woodworking, Injury No: 98-134295