

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

Injury No.: 00-070175

Employee: Randall Humphrey

Employer: Verslues Construction

Insurer: Silvey Companies

Date of Accident: May 16, 2000

Place and County of Accident: Jefferson City, Cole 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. 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 November 2, 2006. The award and decision of Administrative Law Judge Hannelore D. Fischer, issued November 2, 2006, 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 14th day of May 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: John J. Hickey, Member

Secretary

AWARD

Employee: Randall Humphrey

Injury No. 00-070175

Dependents:

Before the

Employer: Verslues Construction

**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial

Additional Party: Second Injury Fund (N/a - settled)

Relations of Missouri
Jefferson City, Missouri

Insurer: Silvey Companies

Hearing Dates: 9/6/2006 and 9/22/2006

Checked by: HDF/cs

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: May 17, 2001.
5. State location where accident occurred or occupational disease was contracted: Jefferson City, Mo.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment?
Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
(See award.)
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:
14. Nature and extent of any permanent disability: 30% BAW
15. Compensation paid to-date for temporary disability: \$21,297.11.
16. Value necessary medical aid paid to date by employer/insurer? \$27,412.76.
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages: \$664.17.
19. Weekly compensation rate: \$443.45 ppd, ptd/\$303.01 ppd.
20. Method wages computation: By award.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: prescription expense:	\$ 182.98
underpayment of temporary total disability:	1,762.28
120 weeks of permanent partial disability from Employer	36,361.20

(30% ppd of the body as a whole.)

22. Second Injury Fund liability: (Settled.)

TOTAL: \$38,306.46

23. Future requirements awarded: N/a.

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:

Ronald Edelman

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Randall Humphrey

Injury No: 00-070175

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents:

Employer: Verslues Construction

Additional Party Second Injury Fund (N/a - settled)

Insurer: Silvey Companies

Checked by: HDF/cs

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on September 6, 2006, and September 22, 2006.

The parties stipulated that on or about May 16, 2000, the claimant was in the employment of Verslues Construction; the claimant sustained an injury by accident; the accident arose out of and in the course of employment; the employer was operating under the provisions of the Missouri workers' compensation law; the employer's liability was insured by Silvey Companies; the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law; temporary total disability benefits have been paid to the claimant to date in the amount of \$21,297.11, those payments representing 52 weeks of benefits, ending May 17, 2001, paid at \$409.56; medical aid has been provided in the amount of \$27,412.74.

The issues to be resolved by hearing include 1) the appropriate rate of compensation, 2) the nature and extent of permanent disability, 3) the liability of the employer/insurer for past temporary total disability benefits, noting that 52 weeks of compensation have been paid at the rate of \$409.56 per week and that the claimant is alleging that the appropriate rate of compensation is \$477.73 per week resulting in a \$3,544.84 underpayment of temporary total disability benefits, and 4) the liability of the employer/insurer for past and future medical treatment and bills .

FINDINGS OF FACT

The claimant, Randall Humphrey, injured his back on May 16, 2000, when, while working for Verslues Construction, he was left holding a 250- to 300-pound garage door frame when his fellow employee dropped the side of the garage door frame he was holding leaving Mr. Humphrey with the full weight of the door frame. Mr. Humphrey felt pain in his back and then dropped the garage door frame. Mr. Humphrey received initial medical treatment with Dr. Dudenhoeffer. Mr. Humphrey continued to work for Verslues Construction until May 23, 2000. On that date, Mr. Humphrey reported slipping on a roof to Dr. Dudenhoeffer, although Mr. Humphrey testified during the hearing that he suffered only an aggravation of his back pain.

Mr. Humphrey received medical attention from Dr. Lucio, who performed epidural steroid injections in Mr. Humphrey's low back, and Dr. Trecha, who performed a microdiscectomy in September of 2000. Dr. Trecha released Mr. Humphrey to return to work with restrictions in May of 2001.

Mr. Humphrey sought additional medical treatment with Dr. Dudenhoeffer and Dr. Bondurant. Prior to May of 2000, Mr. Humphrey had complaints of back pain, headaches and sustained an injury to the middle finger of his right hand.

Mr. Humphrey testified that he believed he was making \$716.88 per week on average during the thirteen weeks prior to May 16, 2000. Mr. Humphrey normally worked five days a week but could have missed some time due to rain. The wage statement reflects thirteen weeks of wages prior to May 26, 2000, twelve weeks of wages prior to May 19, 2000, and eleven weeks of wages prior to May 12, 2000. For this eleven weeks of wages prior to May 12, 2000, the average weekly wage is \$665.17. The wage statement reflects hours worked for each week. For the eleven weeks prior to May 12, 2000, the hours worked per week vary from a low of 27.5 to a high of 45.5. Only hours worked per week are reflected, not days worked per week.

Dr. Raymond Cohen, D.O., testified by deposition taken on May 1, 2006, and July 31, 2006. Dr. Cohen is an osteopathic physician. He has been certified and re-certified by the American Society of Physician Specialties in the field of neurology.

Dr. Cohen authored several reports pertaining to Mr. Humphrey's condition. The November 15, 2001 report refers to Mr. Humphrey's permanent and total disability as the result of the combination of his back injury of May 16, 2000, with his 1997 back injury, a prior head injury and a prior injury to Mr. Humphrey's right hand. Dr. Cohen noted that Mr. Humphrey last worked on May 16, 2000, in his initial report, rather than the May 23, 2000 date which was his actual last day of work. Dr. Cohen went on to specifically state that Mr. Humphrey's pre-2000 injuries were a hindrance or obstacle to Mr. Humphrey's employment or re-employment. Mr. Humphrey's permanent disability as the result of his May 16, 2000 injury was assessed as fifty percent (50%) for the lumbar spine injury and an additional twenty percent (20%) for depression. Dr. Cohen's report of almost a year later, October 24, 2002, refers to Mr. Humphrey's cumulative trauma up through May 23, 2000, and sets forth disability in both of Mr. Humphrey's wrists and elbows. Dr. Cohen again concludes his 2002 report referring to Mr. Humphrey's permanent total disability resulting from the combination of pre-existing "conditions or disabilities" combined with primary work-related injuries. On January 30, 2003, and April 14, 2006, Dr. Cohen authored supplemental reports confirming his prior medical opinions.

Dr. Cohen confirmed these opinions again during his deposition testimony. However, Dr. Cohen also testified that the injuries sustained as the result of the May 16, 2000 accident alone rendered Mr. Humphrey permanently and totally disabled.

Dr. Cohen found Mr. Humphrey to be in need of Mobic and Ultram as the result of the May 16, 2000 injury. However, when asked about Mr. Humphrey's medications, Dr. Cohen did not know whether Mr. Humphrey was still taking Hydrocodone on November 15, 2001, or what Mr. Humphrey's dosing schedule was for the Ultram. Dr. Cohen also testified that treatment Mr. Humphrey received from Doctors Dudenhoeffer, Bondurant and Lucio for his low back was the result of the May 16, 2000 injury. When asked about Mr. Humphrey's depression, Dr. Cohen did not know the onset of Mr. Humphrey's depression or about any other potential stressors or causes of Mr. Humphrey's depression.

Mr. James England, vocational rehabilitation counselor, testified by deposition on July 11, 2006. Mr. England evaluated Mr. Humphrey on January 4, 2002. Mr. England opined that Mr. Humphrey was neither a

candidate for employment or vocational rehabilitation. Mr. England pinpointed the date of Dr. Trecha's release of Mr. Humphrey, May 14, 2001, with permanent restrictions, as the date of permanent and total disability. Mr. England opined that Mr. Humphrey could not return to his prior employment or "other kinds of work." Mr. England specifically related that it was the restrictions imposed by Dr. Trecha and Dr. Mirkin that prevented Mr. Humphrey from his return to work in construction.

During cross-examination, Mr. England admitted that it was possible that Mr. Humphrey is permanently and totally disabled from the combination of his pre-existing closed-head injury, right hand injury and low back injury combined with his injury of May of 2000. Mr. England also stated that while it appears that Mr. Humphrey's back is disabling him, it is not clear to Mr. England what role Mr. Humphrey's pre-existing back problems or either of two May of 2000 injuries played.

Dr. Randall Trecha, orthopedic surgeon with a special interest in adult reconstructive spine surgery, testified by deposition on April 14, 2006, that he initially evaluated Mr. Humphrey on July 24, 2000. Dr. Trecha's notes reflect Mr. Humphrey's account of an accident involving both "trying to get up on a roof" and "lifting a 230 pound load." Dr. Trecha stated that a June 2, 2000 MRI reflected degenerative changes present. Dr. Trecha also diagnosed a "herniated nucleus pulposus." When Mr. Humphrey's condition continued to deteriorate, Dr. Trecha performed a microdiscectomy at L5-S1 on September 5, 2000. A repeat MRI in early 2001 showed drying out of Mr. Humphrey's lower disks, a finding Dr. Trecha did not relate to the surgery. The repeat MRI revealed no repeat disk herniation.

Dr. Trecha last examined Mr. Humphrey on June 6, 2001, and recommended that Mr. Humphrey avoid bending, lifting, twisting, climbing and crawling. On March 7, 2002, Mr. Humphrey contacted Dr. Trecha again for a refill of pain and anti-inflammatory medication which Dr. Trecha's office provided. Dr. Trecha opined that Mr. Humphrey's permanent disability as the result of the May 16, 2000 accident is twenty percent (20%) of the body. Dr. Trecha opined that Mr. Humphrey should not return to work as a carpenter in the construction industry.

Claimant's counsel posed the question whether the May 16, 2000 incident where Mr. Humphrey "was attempting to get up on a roof, and lifting 230 pound brace frame or other object" was the substantial factor in causing Mr. Humphrey's back condition requiring Dr. Trecha's treatment and Dr. Trecha responded affirmatively.

Dr. Trecha opined that continued care for Mr. Humphrey's lumbar "pain syndrome" with his family practice doctor would be appropriate as would an MRI taken in May of 2002 to assess the status of Mr. Humphrey's spine and as would continued care from physicians including pain management. Dr. Trecha ascribed Mr. Humphrey's ongoing back complaints, in part, to the degenerative deterioration of Mr. Humphrey's back.

Dr. Trecha prescribed Ultram and Mobic for Mr. Humphrey throughout his case for Mr. Humphrey. In March and April of 2002, unpaid prescription expenses for Ultram and Mobic totaled \$182.98. No prescriptions for Ultram or Mobic appear in Dr. Dudenhoeffer's records.

APPLICABLE LAW

Section 287.250.1(4) provides as follows:

Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:

- (1) If the wages are fixed by the week, the amount so fixed shall be the average weekly wage;
- (2) If the wages are fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve and divided by fifty-two;
- (3) If the wages are fixed by the year, the average weekly wage shall be the yearly wage fixed divided by fifty-two;
- (4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week

shall be excluded in computing the average weekly wage pursuant to this subdivision.

Griggs v. A. B. Chance Company, 503 S.W.2d 697 (WD 1973) which stands for the proposition that compensation is disallowed for any disability traceable to more than one cause, only one of which would be the responsibility of the employer.

Section 287.190.3 provides as follows:

For permanent injuries other than those specified in the schedule of losses, the compensation shall be paid for such periods as are proportionate to the relation which the other injury bears to the injuries above specified, but no period shall exceed four hundred weeks, at the rates fixed in subsection 1. The other injuries shall include permanent injuries causing a loss of earning power. For the permanent partial loss of the use of an arm, hand, thumb, finger, leg, foot, toe or phalange, compensation shall be paid for the proportionate loss of the use of the arm, hand, thumb, finger, leg, foot, toe or phalange, as provided in the schedule of losses.

AWARD

The claimant, Randall Humphrey, has sustained his burden of proof that his compensation rate for temporary total disability benefits is \$443.45. Section 287.250 provides for a calculation of the average weekly wage for the weeks preceding the week of the injury. The average compensation per week for the eleven weeks preceding May 16, 2000, is \$665.17. The claimant's argument that the compensation rate should be calculated on the basis of a division of ten rather than eleven weeks of work is misplaced where there is no evidence of an absence of days worked, only of weeks where less than 40 hours were worked. Thus, for the 52 weeks of temporary total disability paid at a rate of \$409.56 per week, a total of \$1,762.28 is owed.

The claimant, Randall Humphrey, has sustained his burden of proof that he has sustained a permanent partial disability of thirty percent (30%) of the body as the result of his accident and injury of May 16, 2000. Dr. Trecha testified that as the result of the May 16, 2000 accident and injury, Mr. Humphrey's permanent partial disability is twenty percent (20%) of the body. Dr. Cohen found Mr. Humphrey to be fifty percent (50%) permanently partially disabled as the result of the May 16, 2000 accident and injury. Dr. Cohen's finding of permanent and total disability is found incredible where Dr. Cohen initially attributed Mr. Humphrey's alleged permanent total disability to a combination of his pre-existing injuries with those sustained on May 16, 2000, but later testified that it was the May 16, 2000 accident alone which caused his permanent and total disability. Dr. Cohen's finding of permanent disability attributable to depression caused by the May 16, 2000 accident and injury is found to be incredible where Dr. Cohen has demonstrated no qualifications to make such a diagnosis.

Mr. Humphrey has sustained his burden of proof that he is entitled to payment for the prescriptions of Mobic and Ultram prescribed for him in March and April of 2002. Dr. Trecha testified specifically to Mr. Humphrey's use of Ultram and Mobic to alleviate his back pain as part of his treatment for the May 16, 2000 injury. While Mr. Humphrey has incurred medical costs for treatment of his back since his release from treatment by Dr. Trecha in May of 2001, it is not clear whether this is treatment for a back injury of May 16, 2000, a back injury of May 23, 2000, or a degenerative back condition. Dr. Trecha's testimony pertaining to Mr. Humphrey's medical needs is found to be most persuasive and credible, where Dr. Trecha is an orthopedic surgeon and Mr. Humphrey's May 16, 2000 accident resulted in an orthopedic injury. Dr. Trecha's opinion regarding Mr. Humphrey's need for medical treatment for his back is premised on claimant's counsel's description of the combination of both the May 16 and May 23, 2000 accidents as well as the degenerative condition of his back.

All exhibits offered into evidence which were subjected to a deferred ruling on admissibility are admitted into evidence.

All objections in the depositions preserved for ruling are overruled.

Date: November 1, 2006

Made by: /s/Hannelore D. Fischer

HANNELORE D. FISCHER
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Patricia "Pat" Secret

Patricia "Pat" Secrest, *Director*
Division of Workers' Compensation