

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

Injury No.: 99-070485

Employee: Joe Johnson
Employer: Prime, Inc.
Insurer: Evergreen National Indemnity Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: June 8, 1999

Place and County of Accident: Greene County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 associate 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 associate administrative law judge dated October 4, 2004, as corrected October 6, 2004. The corrected award and decision of Associate Administrative Law Judge L. Timothy Wilson, issued October 6, 2004, is attached and incorporated by this reference.

The Commission further approves and affirms the associate 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 February 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

V A C A N T

Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Joe Johnson

Injury No. 99-070485

Dependents: N/A
Employer: Prime, Inc.
Additional Party: Second Injury Fund
Insurer: Evergreen National Indemnity Co.
Hearing Date: January 29, 2004

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: LTW/mp

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 8, 1999
5. State location where accident occurred or occupational disease was contracted: Greene County, Missouri
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:
While performing his work duties as an over-the-road truck driver, severe winds caused the flat bed trailer to flip over on to the side of the road.
12. Did accident or occupational disease cause death? N/A Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: low back, thoracic and cervical spine, right and left shoulders
14. Nature and extent of any permanent disability: permanent total disability
15. Compensation paid to-date for temporary disability:
16. Value necessary medical aid paid to date by employer/insurer?
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages:
19. Weekly compensation rate: \$562.67/294.73
20. Method wages computation: award

COMPENSATION PAYABLE

21. Amount of compensation payable:

The employer and insurer are ordered to provide the employee with future medical care consistent with the opinions of Drs. Bouvette and Belz.

temporary total disability \$13,209.03

Permanent total disability benefits from Employer beginning July 1, 2002 , for Claimant's lifetime at the rate of \$562.67 per week

22. Second Injury Fund liability: No

The claim against the Second Injury Fund is denied.

TOTAL: \$13,209.03

23. Future requirements awarded: See above

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:

Paul Reichert

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Joe Johnson

Injury No: 99-070485

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: Prime, Inc.

Additional Party Second Injury Fund

Insurer: Evergreen National Indemnity Co.

Checked by: LTW/mp

The above-referenced workers' compensation claim was heard before the undersigned Associate Administrative Law

Judge on January 29, 2004. The parties, however, asked that a decision not immediately issue in order to afford them an opportunity to explore settlement and resolution of the case following issuance of an informal opinion. Subsequently, on or about July 27, 2004, the parties submitted a letter requesting that a final award and decision issue be made. Thusly, the parties were afforded an opportunity to submit briefs, resulting in the record being completed and submitted to the undersigned on or about July 29, 2004.

The claimant appeared personally and through his attorney Paul Reichert, Esq. The employer appeared through its attorney Brian K. McBrearty, Esq. The Second Injury Fund appeared through its attorney Cara Harris, Assistant Attorney General.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about June 8, 1999, Prime, Inc., was an employer operating under and subject to The Missouri Workers' Compensation Law and during this time was fully insured by Evergreen National Indemnity Co.
- (2) On the alleged injury date of June 8, 1999, Joe Johnson was an employee of the employer and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about June 8, 1999, the claimant sustained an accident which arose out of and in the course and scope of employment.
- (4) The above-referenced employment and accident occurred in the State of Texas. However, the employee's contract of employment was made in Missouri; and the parties agree to venue lying in Springfield (Greene County), Missouri. Venue is proper.
- (5) The claimant notified the employer of his injury as required by Section 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) At the time of the alleged accident, the claimant's average weekly wage was sufficient to allow minimally a compensation rate of \$500.18 for temporary total disability compensation and a compensation rate of \$294.73 for permanent partial disability compensation. (The parties agreed that the temporary total disability compensation rate remains an issue, as the employee contends that the applicable temporary total disability compensation rate should be at the statutory maximum -- \$562.67.)
- (8) Temporary disability benefits have been provided to the claimant in the amount of \$76,175.12, representing 142 weeks of benefits, and payable for the periods of July 6, 1999, through March 26, 2002.
- (9) The employer and insurer have provided medical treatment to the employee, having paid benefits in the amount of \$148,124.62.

The parties further stipulated that the issues to be resolved by hearing include:

- (1) Whether the claimant has sustained injuries that will require future or additional medical care in order to cure and relieve the claimant of the effects of the injuries?
- (2) What is the applicable compensation rate for payment of temporary total disability compensation?
- (3) Whether the claimant is entitled to temporary disability benefits? (The claimant seeks temporary total disability compensation for the period of March 27, 2002, to July 1, 2002, while alleging an applicable compensation rate of \$562.67. Also, in light of the claimant alleging a higher compensation rate, the claimant seeks additional temporary total disability compensation for the period of temporary disability previously paid by the ER/I.)
- (4) Whether the claimant sustained any permanent disability as a consequence of the alleged accident; and, if so, the nature and extent of the disability?
- (5) Whether the Second Injury Fund is liable for payment of certain permanent disability compensation? (This issue shall remain open, as the parties agreed to defer the

adjudication of the liability of the Second Injury Fund.)

EVIDENCE PRESENTED

The claimant testified at the hearings in support of his claim. Also, the claimant presented at the hearings of this case the testimony of his wife, Lillie Johnson. In addition, the claimant offered for admission the following exhibits:

Exhibit A Medical Report of E. Alexander L'Heureux, M.D.
Exhibit B Federal Drug Testing Company & Control Form
Exhibit C DOT Breath Alcohol Testing Form
Exhibit D Business Card of Lanita Cole, R.N. (Concentra Managed Care, Inc.)
Exhibit E Medical Report of Norbert T. Belz, M.D.
Exhibit F ... Information Sheet Re: Beginning Back Stabilization – Level 1 Exercises (3 pages)
Exhibit G Information Sheet Re: Exercises for Shoulder Disorders & Helpful Hints for Healthy Shoulders
Exhibit H 1999 Tax Statement (Form 1099-MISC)
Exhibit K Walgreens Prescription Profile for Joe Johnson

The exhibits were received and admitted into evidence.

The employer and insurer did not present any witnesses at the hearing of this case. The employer and insurer, however, offered for admission the following exhibits:

Exhibit 1 Medical Records from Michael C. Chabot, D.O.
Exhibit 2..... Medical Records from Oklahoma Spine Sports & Rehabilitation
Exhibit 3 Medical Records from Gil Mobley, M.D.
Exhibit 4 Medical Records from John W. Ellis, M.D.
Exhibit 5 Medical Records from The Neuroscience Institute At Mercy
Exhibit 6 Medical Report from Christopher M. Bouvette, M.D. (July 20, 2000)
Exhibit 7 Medical Report from Christopher M. Bouvette, M.D. (July 1, 2002)
Exhibit 8 Key Functional Assessment from Christopher M. Bouvette, M.D. (July 1, 2002)
Exhibit 9 Surveillance Video
Exhibit 10 Surveillance Video
Exhibit 11 CV of Christopher M. Bouvette, M.D.
Exhibit 12 Deposition of Norbert Belz, M.D.

The exhibits were received and admitted into evidence.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the Legal File. These documents include: Notice of Hearing; Receipt & Notice of Termination of Compensation (filed April 1, 2002); Temporary or Partial Award; Receipt and Notice of Termination of Compensation; Report of Injury (filed May 9, 2001); Notice of Hearing (Hardship Setting); Letter Dated March 13, 2001; Motion for Temporary Order for Medical Treatment and Compensation; Receipt and Notice of Termination of Compensation (filed July 17, 2000); Answer of Second Injury Fund to Claim for Compensation; Answer of Employer / Insurer to Claim for Compensation; Claim for Compensation; and Report of Injury.

Also, subsequent to the hearing, the claimant, by counsel, moved to supplement the record with wage information provided to the employee from the employer. This information, which is entitled "Prime, Inc. Operator Settlements Final" and consisting of 7 pages, was received on or about July 27, 2004. The employer and insurer did not respond specifically to this request, and it is not part of a stipulation regarding admission of evidence. These documents, therefore, are received, but not admitted into evidence. (The cover letter, together with the Motion to Supplement the Record, together with the employer and insurer's letters of reply, having been received, are included in the Legal File, but are not admitted into evidence. And these documents are not included in the consideration of this decision.)

DISCUSSION

The claimant, Joe Johnson, is 54 years of age, having been born on June 9, 1950. He is a resident of Oklahoma City, Oklahoma.

In June 1999 Mr. Johnson was engaged in employment with Prime, Inc., as an over-the-road truck driver. In this employment, on June 8, 1999, Mr. Johnson was in the State of Texas hauling a light load of plastic pipes. At the time of this

delivery, Mr. Johnson was utilizing a flat bed trailer, enroute to San Antonio from Campbell, Texas, and was traveling along a two-lane back road. Traveling at an approximate speed of 15 to 20 mph, Mr. Johnson experienced severe winds which caused the trailer to flip over onto the side of the road. The position of the trailer caused the cab to be situated on its side and up in the air. This accident arose out of and in the course of employment.

At the time of the June 8, 1999, accident, Mr. Johnson was wearing his seat belt and did not get thrown out of the cab. Initially, according to Mr. Johnson, he did not experience any noticeable or immediate pain. Additionally, he was able to climb out of the cab and call the employer's dispatcher with his cellular phone. Within minutes emergency personnel arrived and provided immediate attention and care to Mr. Johnson and a fellow rider, who was a friend of Mr. Johnson. Approximately one hour later the employer had Mr. Johnson undergo a drug and alcohol testing, which was proven to be negative.

Also, subsequent to this incident, the employer provided Mr. Johnson with a hotel room and certain transportation for getting home. On June 9, 1999, Mr. Johnson traveled back to the State of Oklahoma. In the course of traveling to Oklahoma, Mr. Johnson began to notice pain in his low back and buttocks which progressed into his legs. Additionally, Mr. Johnson experienced pain in his upper back / cervical spine and between his shoulders.

Approximately a week after the accident, the employer referred Mr. Johnson to Gil Mobley, M.D., who is a physician practicing in occupational medicine in Springfield, Missouri. Dr. Mobley provided conservative treatment which included prescription medications and hot packs. Additionally, Dr. Mobley recommended that Mr. Johnson receive physical therapy and placed certain modified work restrictions on Mr. Johnson which precluded him from returning to work as an over-the-road truck driver.

In light of continuing pain and living in the State of Oklahoma, Mr. Johnson requested that he be provided with medical treatment in Oklahoma near his home. Thereafter, with approval of the employer and insurer, Mr. Johnson initiated treatment with John W. Ellis, M.D., who is a physician practicing in the specialty of occupational medicine. At the time of his initial examination, which occurred on or about July 16, 1999, Dr. Ellis determined that Mr. Johnson was temporarily and totally disabled and excused him from work. Further, Dr. Ellis prescribed additional physical therapy and followed up with Mr. Johnson's care.

Eventually, without improvement, and while continuing to be temporarily and totally disabled, Mr. Johnson received a referral to see Scott A. Mitchell, D.O., who is a physician affiliated with The Neuroscience Institute At Mercy. Dr. Mitchell provided Mr. Johnson with pain management treatment which included epidural steroid injections and the use of a TENS unit. On September 27, 1999, Mr. Johnson underwent a diagnostic procedure in the nature of a lumbar discogram which identified a positive disc of the low back at the level of L5-S1.

On October 4, 1999, Dr. Mitchell determined that Mr. Johnson needed a surgical opinion and referred him to Alex L'Heureux, M.D., who is an orthopedic surgeon. Thereafter, on or about November 2, 1999, Mr. Johnson presented to Dr. L'Heureux for a surgical consultation with low back pain and bilateral lower extremity radiculopathy. Dr. L'Heureux determined that Mr. Johnson was a surgical candidate. Dr. L'Heureux recommended that Mr. Johnson proceed with an anterior spine fusion which involved a complete disc excision at the level of L5-S1 and allograft insertion, followed by posterior spine reconstruction and instrumentation fusion at the level of L5-S1 with iliac crest bone graft. This surgery was performed at the Oklahoma Spine Hospital on January 17, 2000.

Dr. L'Heureux provided Mr. Johnson with follow-up medical care. Additionally, Mr. Johnson received follow-up care with a Dr. Schwartz, who provided pain management treatment. Mr. Johnson continued to be temporarily and totally disabled during the period of his treatment with Drs. Ellis, Mitchell, L'Heureux, and Schwartz. On June 13, 2000, Dr. L'Heureux determined that, from a surgical standpoint, Mr. Johnson had reached maximum medical improvement. Additionally, Dr. L'Heureux released Mr. Johnson from his care with restrictions of no lifting greater than 50 pounds at any given time and only a few times a day; and he is to change position every thirty minutes to one hour.

Although releasing Mr. Johnson from his care, Dr. L'Heureux did not state Mr. Johnson had completely reached maximum medical improvement. At the time of the June 13, 2000, examination, Dr. L'Heureux noted that Mr. Johnson continued to follow up with Dr. Schwartz, who was weaning Mr. Johnson off his narcotic medication. Dr. L'Heureux thus indicated a desire to defer to Dr. Schwartz for the purpose of determining when and whether Mr. Johnson should be released from medical treatment.

Further, at the time of the June 13, 2000, examination, Dr. L'Heureux advised Mr. Johnson's case manager of Mr. Johnson's need for future surgery. In discussing this concern, Dr. L'Heureux propounded the following comments:

Mr. Johnson will require removal of his instrumentation from his lumbar spine as per the Food and Drug Administration guidelines, which is 18 months from the index procedure. At that time it will give me a chance to explore the fusion mass to be sure the fusion is solid. If his fusion is solid the instruments can be removed and left out. If his fusion is not completely healed he may require re-instrumentation with grafting and a bone growth stimulator placement to be sure that it goes on to uneventful arthrodesis.

In light of the additional medical care being indicated, Dr. L'Heureux scheduled Mr. Johnson to follow up with him in December 2000.

On July 20, 2000, Mr. Johnson presented to Christopher M. Bouvette, M.D., for examination and evaluation relative to a determination of permanent disability, referable to Mr. Johnson's June 8, 1999, accident. At the time of this examination, Dr. Bouvette took a history from Mr. Johnson, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of the claimant, Dr. Bouvette opined that, as a consequence of this accident, Mr. Johnson suffers from the following conditions:

1. Lumbar degenerative disc disease, status post anterior spine fusion at the level of L5-S1, with posterior spine reconstruction and instrumentation at the level of L5-S1;
2. Cervical strain;
3. Right shoulder sprain / strain with limited range of motion.

Further, at the time of this examination, Dr. Bouvette determined that the June 8, 1999, accident caused Mr. Johnson to present with permanent work restrictions. These restrictions included working at a medium work category exerting up to 50 pounds of force occasionally, and/or up to 20 pounds of forces frequently, and/or up to 10 pounds of force constantly to move. (Dr. Bouvette provided definition to the terms "occasional," "frequently," and "constantly.") Dr. Bouvette further determined that Mr. Johnson could not return to work as a truck driver because of certain prescription medication for pain being prescribed for him.

Also, at the time of the July 20, 2000, examination, Dr. Bouvette determined that Mr. Johnson should be provided with future maintenance care. Dr. Bouvette identified this care and propounded the following comments:

For medical conditions and symptoms resulting from the work related injury, future maintenance care should include routine medical follow-up visits with Mr. Johnson's primary care physician, judicious use of nonnarcotic and narcotic medications with maintenance opioid contracting, and a continued home exercise program as previously outlined in physical therapy. In addition, this gentleman will require the consideration of hardware removal per Dr. L'Heureux at 18 months following the date of surgery....If scheduled medications are required chronically, his primary care physician or chronic pain management specialist may need to perform routine blood serologies to screen for metabolic dysfunction such as elevated liver enzymes, bone marrow suppression, etc. if indicated.

Finally, in rendering an assessment of permanent disability, Dr. Bouvette determined that, as a consequence of the accident of June 8, 1998, Mr. Johnson had sustained a permanent partial impairment of 18 percent to his body as a whole. Notably, in rendering this opinion, Dr. Bouvette rendered an opinion of permanent impairment, as opposed to disability, according to the Dictionary Occupational Titles, U.S. Department of Labor, 4th edition, revised, 1991.

Subsequent to the July 20, 2000, examination, Mr. Johnson continued to present with complaints of pain and remained unemployed. On December 14, 2000, Mr. Johnson presented to Dr. L'Heureux for the scheduled follow-up examination. At the time of this December 14th examination, Mr. Johnson continued to present with complaints of pain; and Dr. L'Heureux expressed concern that Mr. Johnson was developing a pseudoarthrosis. In light of these concerns, Dr. L'Heureux recommended that Mr. Johnson undergo additional diagnostic studies, including a CT scan. Additionally, Dr. L'Heureux opined that Mr. Johnson was, and should remain, temporarily and totally disabled.

The employer and insurer did not authorize or provide the treatment recommended by Dr. L'Heureux. On December 20, 2000, Mr. Johnson, through his legal counsel, wrote a letter to Dr. L'Heureux, wherein several questions were presented to him. Responding to these questions, Dr. L'Heureux issued a letter dated January 3, 2001. In this letter Dr. L'Heureux propounded several opinions, which included the following:

1. Mr. Johnson has not reached maximum medical improvement from his original injury of 06/08/99. He requires ongoing medical treatment and he will most likely require a revision of his lumbar fusion so that he may get back to gainful employment.
2. Mr. Johnson will require a CT scan through the L5-S1 level to further assess the solidity of his fusion at that level. If there are any questions that a pseudoarthrosis is developing a revision fusion as outlined above would be required. His injury sustained 06/08/99 was substantial cause for his original fusion and continues to be the main reason for ongoing medical treatment.

* * *

5. Mr. Johnson has not regained the physical capacity to resume his normal duties as a over-the-road tractor/trailer operator for Prime Incorporated. He continues to be temporarily and totally disabled until he is able to complete the treatment management program that I have outlined for him.
6. Mr. Johnson has been temporarily and totally disabled as a result of his injury since the date of that injury on 06/08/99. Since that time he has been unable to resume his normal duties as an over-the-road tractor/trailer operator and he will not be able to resume these duties in the near future until the proposed medical treatment has been completed.
7. ...Mr. Johnson has not reached maximum medical improvement and that he will remain temporarily and totally disabled for at least the next six months to one year depending on the delay in the proposed medical treatment.

* * *

On March 15, 2001, upon referral by the employer and insurer, Mr. Johnson presented to Michael C. Chabot, D.O., who is a physician practicing with Spine Specialists of St. Louis in St. Louis, Missouri, for an independent medical examination. At the time of this examination, Dr. Chabot took a history from Mr. Johnson, reviewed various medical records, and performed a physical examination of him. Also, Dr. Chabot had Mr. Johnson undergo certain diagnostic studies that included an EMG and a CT scan.

In light of his examination and evaluation of the claimant, Dr. Chabot determined that the EMG and CT scan studies were negative, without evidence of focal neurologic compression. (Dr. Chabot, however, acknowledged the lack of completeness of such a study, stating, "an enhanced CT myelographic study would be a better study to evaluate for neural compression.") Dr. Chabot further opined that the source of Mr. Johnson's back pain was not "clearly defined." In asserting his belief that Mr. Johnson should not be afforded another surgical procedure, Dr. Chabot propounded the following comments:

I would further argue that there is no clear indication that further surgical intervention on this individual would result in any significant improvement in his symptoms or allow him to return to his prior work duties. It is my opinion that following a second surgical procedure as outlined by Dr. L'Heureux, the patient would most likely continue to have pain and would most likely not return to his prior work duties.

In considering the nature and extent of Mr. Johnson's disability, Dr. Chabot opined that the accident of June 8, 1999, caused Mr. Johnson to sustain a permanent partial disability of 18 percent to the body as a whole. Additionally, Dr. Chabot opined that, while Mr. Johnson is governed by certain restrictions and limitations, he "should be able to return to limited duty as outlined by Dr. Bouvette, lifting no more than 50 pounds, occasional lifting of 35 pounds, and frequent lifting in the 10-15 pound range. Also, in noting that Mr. Johnson is not currently on any narcotic pain medication, Dr. Chabot is of the opinion he should be able to "qualify for driving trucks."

On April 10, 2001, a hardship hearing was held, wherein Mr. Johnson requested an award to issue, ordering the employer and insurer to provide him with additional medical treatment and temporary disability compensation. Subsequently, on or about May 21, 2001, the undersigned issued a Temporary or Partial Award, ordering the employer and insurer to provide Mr. Johnson with additional medical care, including surgery, together with additional temporary disability compensation.

Subsequent to the issuance of the aforementioned award, the employer and insurer provided Mr. Johnson with the additional medical care. This additional treatment included diagnostic studies of his shoulders, which evidenced tears to both shoulders. In light of these findings and persistent pain, on November 13, 2001 Mr. Johnson underwent a subacromial decompression with rotator cuff repair of the right shoulder; and he followed up with postoperative rehabilitation. Mr. Johnson was offered, but he declined to proceed with additional surgery for the rotator cuff tear to his left shoulder.

On July 1, 2002, Mr. Johnson underwent a functional capacity evaluation, which indicated that Mr. Johnson's performance fell within the light-work category. Thereafter, following review of this functional evaluation, Christopher M. Bouvette, M.D., opined that, effective as of July 1, 2002, Mr. Johnson had reached maximum medical improvement relative to Mr. Johnson's shoulders. (Dr. Bouvette opined that Mr. Johnson had reached maximum medical improvement on July 10, 2000, relative to the cervical spine and lumbar spine.) Dr. Bouvette further opined that, in light of the injuries sustained to Mr. Johnson's cervical spine, lumbar spine, and right and left shoulders and, in accordance with the AMA Guides to the Evaluation of Permanent Impairment, fourth edition, Mr. Johnson presents with a whole person impairment of 27 percent.

In addition, Dr. Bouvette is of the opinion that, in light of the aforementioned injuries, he should be provided with

additional medical care, including follow-up care from his primary care physician, and “judicious use of nonnarcotic medications if indicated, and a continued home exercise program. Additionally, Dr. Bouvette indicates that, relative to the left shoulder, “Dr. Hargrove’s services may be indicated to determine if additional surgery is indicated.”

Finally, Dr. Bouvette provided an opinion relative to the question of whether Mr. Johnson is capable of returning to employment. In rendering this opinion, Dr. Bouvette states “Mr. Johnson is capable of performing light-duty employment,” and “may work up to 8 hours per day.” However, according to Dr. Bouvette, he is of the opinion that Mr. Johnson is governed by the following permanent restrictions: (1) no lifting or carrying greater than 20 pounds occasionally; (2) no pushing or pulling greater than 50 pounds occasionally; (3) no working at heights; (4) no prolonged bending, stooping, or twisting; (5) the ability to change positions from sit to stand or stand to sit every 30 minutes, as necessary; and (6) no repetitive left upper extremity overhead activities.

Norbert T. Belz, M.D., who is a physician practicing in the specialty of _____ occupational medicine, provided testimony through the submission of a complete medical report, and through the taking of his deposition by the employer and insurer for purposes of cross-examination. According to Dr. Belz, he performed an independent medical examination of the claimant on June 13, 2002. At the time of this examination, Dr. Belz took a history from Mr. Johnson, reviewed various medical records, and performed a physical examination of him. Additionally, before finalizing his opinions and setting forth the opinions into a medical report, Dr. Belz reviewed additional medical records and studies, including the examination and opinions of Dr. Bouvette dated July 1, 2002.

In light of his examination and evaluation of the claimant, Dr. Belz opined that, as a consequence of the accident of June 8, 1999, Mr. Johnson sustained an injury to his lumbar spine, which involved an aggravation of prior asymptomatic degenerative joint and disc disease, and necessitated two surgical repairs, including a 360-degree fusion with instrumentation at the level of L5-S1 and subsequent removal of instrumentation. Dr. Belz further opined that, as a consequence of the accident of June 8, 1999, Mr. Johnson sustained an injury to the thoracic and cervical spine, which involved an aggravation of prior asymptomatic degenerative joint and disc disease, and necessitated conservative treatment; Mr. Johnson sustained an injury to his right shoulder, which involved a rotator cuff tear with aggravation of right shoulder degenerative joint disease and an aggravation of right acromioclavicular arthritis, and necessitated surgical repair; and Mr. Johnson sustained an injury to his left shoulder, which involved a rotator cuff tear, for which he was offered, but declined to have surgery. Relative to these injuries, Dr. Belz opined that Mr. Johnson reached maximum medical improvement on July 1, 2002.

In considering the nature and extent of Mr. Johnson’s disability attributable to the accident of June 8, 1999, Dr. Belz opined the injury to the lumbar spine resulted in Mr. Johnson sustaining a permanent partial disability of 35 percent to the body as a whole; the injury to the cervical and thoracic spine resulted in Mr. Johnson sustaining a permanent partial disability of 10 percent to the body as a whole; the injury to the right shoulder resulted in Mr. Johnson sustaining a permanent partial disability of 20 percent to the body as a whole; and the injury to the left shoulder resulted in Mr. Johnson sustaining a permanent partial disability of 10 percent to the body as whole. Further, in considering the nature and extent of permanent disabilities referable to Mr. Johnson, Dr. Belz opined that, prior to June 8, 1999, Mr. Johnson suffered from illiteracy or a learning disability, which constituted a hindrance and an obstacle to employment, and presented Mr. Johnson with a permanent partial disability of 15 percent to his body as a whole.

Notwithstanding, Dr. Belz is of the opinion that, as a consequence of the accident of June 8, 1999, considered alone, Mr. Johnson is permanently and totally disabled. In rendering this opinion, Dr. Belz propounds the following comments:

The individual [Mr. Johnson] persists with back pain and bilateral lower extremity radiculopathies. To control pain and symptoms, Mr. Johnson is required to recline three times per day. The individual likewise requires a sit/stand workstation with symptom-limited posture changes with the weight limitations as above noted. Thus, the individual demonstrates back and bilateral lower extremity signs and symptoms. In addition, the individual demonstrates bilateral upper extremity signs and symptoms referencing bilateral rotator cuff tear and other shoulder pathology as noted. Further, the individual demonstrates cervical pain and intermittent right upper extremity radiculopathy. The individual is right hand dominant.

As a result of the last occupational injury acting alone, then the individual demonstrates signs and symptoms referencing all four extremities plus the axial skeleton. As a result of same, the individual is required to recline during any 8 hour work shift. The individual is required to recline three times per walking day, at least one-half hour each episode. This necessity to recline is biologically plausible referencing the above noted body part injuries and requisite surgical interventions.

As such, referencing the last occupational injury acting alone, the individual is not placeable on the open market, nor can the individual maintain employment in the open labor market.

Mr. Johnson testified that he became temporarily and totally disabled following the accident of June 8, 1999, and he has never returned to work. According to Mr. Johnson, he continues to suffer severe and disabling pain which hinders his ability to return to work. Mr. Johnson takes prescription medication for the pain. Notably, Mr. Johnson indicates that,

because of this pain, he experiences difficulty sleeping, and averages having to lie down or recline at least two times a day. Yet, Mr. Johnson acknowledges that he is not totally lacking in activities or in the ability to move. For example, he is able to do small things around the house, such as laundry, vacuuming, and plumbing; and he is able to drive his automobile for short distances. Additionally, he is able to squat and bend to the floor with his knees; but he avoids bending over with his back.

Mr. Johnson's wife, Lillie Johnson, testified that she owns a daycare business, which she operates in their home. Mrs. Johnson, however, states that Mr. Johnson does not help her with this activity. According to Mrs. Johnson, Mr. Johnson limits his activities to some occasional fishing and exercises, and will provide his niece or her husband with some transportation, when he is feeling up to it. In addressing the issue associated with Mr. Johnson operating a motor vehicle, Mrs. Johnson notes that she and Mr. Johnson share the duties of driving if the trip involves a day trip, and Mr. Johnson will drive for no more than 1 to 1 ½ hours at a time. Additionally, Mrs. Johnson indicates that Mr. Johnson needs to lie down for about a ½ hour three times a day, and he does not do book work. Mrs. Johnson identified the medication being taken by Mr. Johnson, which includes prescription medication for his pain.

FINDINGS AND CONCLUSIONS

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo.App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo.Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo.App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo.App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Brufat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo.App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo.App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo.App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575, 577 (Mo.App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo.App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo.App. W.D. 1993).

I.

Accident / Medical Causation

On June 8, 1999, the employee, Joe Johnson, sustained an injury by accident, which arose out of and in the course of his employment with Prime, Inc. The injury occurred as Mr. Johnson was utilizing a flat bed trailer to haul a light load of plastic pipes while enroute to San Antonio from Campbell, Texas. During the course of making this delivery, while traveling along a two-lane back road at an approximate speed of 15 to 20 mph, Mr. Johnson experienced severe winds, which caused the trailer to flip over onto the side of the road. The position of the trailer caused the cab to be situated on its side and up in the air.

Initially, according to Mr. Johnson, he did not experience any noticeable or immediate pain, and was able to climb out of the cab and call the employer's dispatcher with his cellular phone. Within minutes emergency personnel arrived and provided immediate attention and care to Mr. Johnson and a fellow rider, who was a friend of Mr. Johnson. Approximately one hour later the employer had Mr. Johnson undergo a drug and alcohol testing, which was proven to be negative.

Also, subsequent to this incident, the employer provided Mr. Johnson with a hotel room and certain transportation for getting home. On June 9, 1999, Mr. Johnson traveled back to the State of Oklahoma. In the course of traveling to Oklahoma, Mr. Johnson began to notice pain in his low back and buttocks, which progressed into his legs. Additionally, Mr. Johnson experienced pain in his upper back / cervical spine and between his shoulders.

The accident of June 8, 1999, caused Mr. Johnson to suffer an injury to his low back, which involved aggravation of a severely degenerative disc at the level of L5-S1 with a painful torn dorsal annular ligament. This injury necessitated receipt of medical care, which included an anterior spine fusion of the L5-S1 level with posterior spine reconstruction and instrumented fusion of the L5-S1 level, and subsequent removal of instrumentation. Further, the accident of June 8, 1999, caused Mr. Johnson to sustain an injury to the thoracic and cervical spine, which involved an aggravation of prior asymptomatic degenerative joint and disc disease, which necessitated conservative treatment. And the accident of June 8, 1999, caused Mr. Johnson to sustain injuries to his right and left shoulders. The injury to the right shoulder involved a rotator cuff tear with aggravation of right shoulder degenerative joint disease and an aggravation of right acromioclavicular arthritis, and necessitated surgical repair. The injury to Mr. Johnson's left shoulder involved a rotator cuff tear, for which he was offered, but declined to have surgery. Mr. Johnson continues to suffer residual and disabling pain as a consequence of this accident and injury of June 8, 1999.

II. Medical Care

Mr. Johnson asserts that, as a consequence of the injuries caused by the accident of June 8, 1999, he is in need of future medical care in order to cure and relieve him of the effects of the injuries. In asserting this claim, Mr. Johnson indicates that he continues to experience residual and disabling pain, for which he needs conservative treatment, including prescription medication. Further, according to Dr. Bouvette, Mr. Johnson should be provided with additional medical care, including follow-up care from his primary care physician, and "judicious use of nonnarcotic medications if indicated, and a continued home exercise program. Additionally, Dr. Bouvette indicates that, relative to the left shoulder, "Dr. Hargrove's services may be indicated to determine if additional surgery is indicated." Similarly, Dr. Belz opines that Mr. Johnson is a candidate for surgery involving his left shoulder, but in light of Mr. Johnson having declined to undergo such treatment, future medical care is not indicated, other than use of Advil.

After consideration and review of the evidence, I find and conclude that the employee, Joe Johnson, suffers continuing disabling pain, which necessitates continuing receipt of reasonable and necessary medical treatment in order to cure and relieve him from the effects of the injuries caused by the accident of June 8, 1999. This future medical treatment is in the nature of conservative treatment involving use of nonnarcotic medications. Accordingly, in light of the foregoing, the employer and insurer are ordered to provide the employee with future medical care consistent with the opinions of Drs. Bouvette and Belz.

III. Compensation Rate

The parties stipulate that, at the time of the accident of June 8, 1999, Mr. Johnson's average weekly wage was sufficient to allow minimally a compensation rate of \$500.18 for temporary total and permanent total disability compensation, and a compensation rate of \$294.73 for permanent partial disability compensation. The employee, however, contends that the average weekly wage he earned in his employment with Prime, Inc., is sufficient to support the statutory maximum compensation rate of \$562.67 for temporary total disability compensation and permanent total disability compensation.

The employer asserts that, relative to this issue, while Mr. Johnson may be classified as a statutory employee of Prime, Inc., he is an independent contractor who received monies from Prime, Inc., that do not necessarily constitute income. The employer thus states that, without a detailed accounting identifying all expenses incurred by Mr. Johnson, the FORM 1099 statement does not accurately reflect Mr. Johnson's average weekly wage. Accordingly, the employer and insurer contend that the employee failed to sustain his burden of proof relative to establishing a higher compensation rate.

After consideration and review of the evidence, I find and conclude that Mr. Johnson was not an independent contractor, but a direct employee of Prime, Inc. Notably, Mr. Johnson only hauled loads for Prime, Inc., and only hauled loads at the direction of Prime, Inc. Further, Mr. Johnson was not allowed by Prime, Inc. to obtain a load on his own, even if it meant his truck sat or ran idle for a number of days. Additionally, when Mr. Johnson sustained the accident on June 8, 1999, Prime, Inc., ordered Mr. Johnson to undergo a drug and alcohol test. Accordingly, having found Mr. Johnson to be an employee, I find the FORM 1099, which indicates that Mr. Johnson earned \$47,163.39 in 1999, is sufficient to establish an applicable average weekly wage, and said wage is sufficient to support a maximum compensation of \$562.67 for temporary total and permanent total disability compensation, and a maximum compensation rate of \$294.73 for permanent partial disability compensation.

IV. Temporary Total Disability Compensation

The evidence is supportive of a finding that Mr. Johnson is entitled to additional temporary total disability compensation. The accident of June 8, 1999, caused Mr. Johnson to begin experiencing severe disabling pain shortly after the incident. And, in light of this pain, he ceased to engage in work with the employer on or about June 15, 1999, and never returned to employment with the employer or any other employer. Further, in light of these injuries and subsequent medical treatment, Mr. Johnson reached maximum medical improvement on July 1, 2002.

After consideration and review of the evidence, I find and conclude that, as a consequence of the accident of June 8, 1999, Mr. Johnson was temporarily and totally disabled for the period of June 15, 1999, to July 1, 2002, which represents 158 6/7 weeks. Accordingly, taking into consideration the applicable compensation rate of \$562.67, Mr. Johnson is entitled to \$89,384.15 in temporary total disability compensation, less payment of temporary disability compensation previously provided to the employee by the employer and insurer. In light of the employer and insurer having paid \$76,175.12 in temporary total disability compensation to Mr. Johnson, he is entitled to \$13,209.03 in additional temporary total disability compensation. Therefore, the employer and insurer are ordered to pay to the employee Joe Johnson the sum of \$13,209.03, which represents the unpaid balance of temporary total disability compensation owed to the employee.

V.

Permanent Disability Compensation

The parties, relying on different medical opinion, offer differing positions on the nature and extent of permanent disability suffered by Mr. Johnson as a consequence of the accident of June 8, 1999. In resolving this issue, I find Mr. Johnson to be credible and accept as true his complaints of pain, as well as his restrictions and limitations.

Also, while Dr. Bouvette does not opine that Mr. Johnson is permanently and totally disabled, he does opine that Mr. Johnson is governed by several restrictions and limitations. In contrast, Dr. Belz opines that Mr. Johnson is permanently and totally disabled, being governed by restrictions and limitations that are more restrictive than that imposed by Dr. Bouvette. These restrictions are different, but not necessarily inconsistent. Further, after considering the medical records, together with the testimonies of the physicians and the testimonies of Mr. and Mrs. Johnson, I do not find any basis to conclude that the restrictions imposed by Dr. Belz are unreasonable or unnecessary. Accordingly, after consideration and review of the evidence, I find and conclude that, as a consequence of the accident of June 8, 1999, considered alone, the employee is permanently and totally disabled. Therefore, in light of the foregoing, the employer and insurer are ordered to pay to the employee, Joe Johnson, the sum of \$562.67 per week for the employee's lifetime. The payment of permanent total disability compensation by the employer and insurer is effective as of July 1, 2002, when he reached maximum medical improvement.

In addition, in light of the aforementioned ruling, the Claim for Compensation, as filed against the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is denied.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable. The award is subject to modifications as provided by law.

Date: October 6, 2004

Made by: /s/ L. Timothy Wilson
L. Timothy Wilson
*Associate Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

/s/ Renee Slusher
Renee Slusher
*Director
Division of Workers' Compensation*