

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

Injury No.: 04-010001

Employee: Douglas Kotraba  
Employer: American Power Conversion Corp. (Settled)  
Insurer: Traveler's Commercial Casualty (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

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 September 15, 2008. The award and decision of Administrative Law Judge Grant C. Gorman, issued September 15, 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 27th day of January 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee: Douglas Kotraba

Injury No. 04-010001

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: None

Employer: American Power Conversion Corp. (Settled)

Additional Party: Treasurer of the State of Missouri  
as Custodian of the Second Injury Fund

Insurer: Traveler's Commercial Casualty (Settled)

Hearing Date: May 28, 2008

Checked by: GCG/ch

### 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: February 2, 2004
5. State location where accident occurred or occupational disease was contracted: St. Charles 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:  
Claimant was moving a compressor when he injured his low back.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Body as a whole referable to low back.
14. Nature and extent of any permanent disability: 30% of Body as a Whole and permanent total disability as a result of a combination of

disabilities.

15. Compensation paid to-date for temporary disability: \$61,962.00
16. Value necessary medical aid paid to date by employer/insurer? \$40,700.29
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$905.00
19. Weekly compensation rate: \$603.35 TTD/347.05 PPD
20. Method wages computation: Stipulation

#### **COMPENSATION PAYABLE**

21. Amount of compensation payable: Employer 's liability settled
22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:  
Weekly differential (\$256.28) payable by SIF for 120 weeks beginning  
June 1, 2006 and, \$603.33 per week thereafter, for Claimant's lifetime

TOTAL: SEE ABOVE

23. Future requirements awarded: None, other than those specified herein.

Said payments to begin, as of the date of this award, 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:

John Larsen, Jr.

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Douglas Kotraba

Injury No: 04-010001

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: None

Employer: American Power Conversion Corp. (Settled)

Additional Party Treasurer of the State of Missouri

as Custodian of the Second Injury Fund

Insurer: Traveler's Commercial Casualty (Settled)

Checked by: GCG/ch

## **PRELIMINARY STATEMENT**

Hearing on the above-referenced case was held before the undersigned Administrative Law Judge on May 28, 2008 at the Division of Workers' Compensation in St. Charles, Missouri. Douglas Kotraba (Claimant) was present and represented by John J. Larsen, Jr. Assistant Attorney General Laura Wagener represented the Second Injury Fund (SIF). Claims against the Employer and Insurer were previously settled. The hearing was held in conjunction with the hearing in Injury Number 05-032159.

The parties made the following stipulations: Claimant sustained accidental injuries arising out of and in the course of his employment on or about February 2, 2004 and April 7, 2005; Claimant was an employee of Employer; venue is proper in St. Charles County, Missouri; Employer received proper notice of injury; claims were filed in a timely manner; and applicable rates of compensation are \$603.33 for total disability and \$347.05 for permanent partial disability (PPD). Employer paid \$61,962.00 in temporary total disability (TTD) benefits (102 5/7 weeks); Employer paid medical expenses totaling \$111,531.20 in connection with the injury of February 2, 2004, and \$1,913.61 following the April 7, 2005 injury. The parties further stipulated that Claimant reached maximum medical improvement (MMI) effective June 1, 2006.

The following issues are presented for determination: nature and extent of Claimant's disability, and liability of the Second Injury Fund.

At the time of the hearing, counsel for Claimant requested leave to take Exhibits F and G, which are x-ray films, in order to make copies for this Court as the originals were the only copies in counsel's possession and the films were quite large. Counsel was granted leave without objection and returned copies which were standard notebook size images of the films to the Court on June 13, 2008 via U.S. mail. Counsel for the Second Injury Fund had the opportunity to review the films prior to submission, and had no objection to the Court receiving them as Exhibits F and G. In a conference held on August 19, 2008 in which Assistant Attorney General Laura Wagener was present in person, and Claimant's attorney John Larsen Jr. was present via telephone, the parties agreed that the record closed on June 13, 2008.

At the hearing, the parties entered into a stipulation that TTD benefits had been paid by Employer in the amount of \$72,458.79. The parties agreed during the conference call held August 19, 2008 that the correct amount of TTD paid by Employer was \$61,962.00 representing 102 5/7 weeks of compensation. The parties, by counsel, agreed that the stipulation made at the hearing was in error and that the amount of TTD to which the parties would stipulate was \$61,962.00.

## **SUMMARY OF THE EVIDENCE**

Only evidence necessary to support the award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. All exhibits offered by the parties were received into evidence without objection. Certain Exhibits offered into evidence may contain additional handwritten markings, underlining and/or highlighting on portions of the documents. Any extraneous markings on the exhibits were present when they were offered by the parties. Further, any such notes, markings and/or highlights were ignored by the undersigned ALJ in reaching any decision in this case.

Claimant testified in person at hearing. Dr. Kennedy testified by deposition (Exhibit A). Timothy Lalk testified by deposition (Exhibit B).

The following exhibits were offered by Claimant and received into evidence without objection:

Exhibit A: Deposition of Dr. David Kennedy  
Exhibit B: Deposition of Timothy Lalk  
Exhibit C: Medical records of Dr. Selwyn Picker  
Exhibit D: Medical records of Dr. Timothy Graven  
Exhibit E: Settlement Stipulation ref. Injury Nos. 04-010001 and 05-032159  
Exhibit F: Copy of x-rays taken October 4, 2004  
Exhibit G: Copy of x-rays taken October 4, 2004

The following exhibits were offered by the Second Injury Fund and received into evidence without objection:

Exhibit I: Medical reports and records of Dr. Daniel Kitchens  
Exhibit II: Medical report and records of Dr. Daniel Phillips

### FINDINGS OF FACT AND RULINGS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant, my personal observations, expert medical and vocational testimony, and all other exhibits received into evidence, I find:

- Claimant sustained compensable injury to his low back while working for American Power Conversion on February 2, 2004 resulting in a 30% permanent partial disability of the body as a whole referable to the low back.
- Prior to the February 2, 2004 work injury, Claimant had sustained injury to his low back requiring surgical fusion with instrumentation resulting in permanent disability which was a hindrance or obstacle to employment.
- As a result of the combination of his work-related and pre-existing low back injuries, Claimant has been rendered permanently and totally disabled.
- The Claimant's work injury of April 7, 2005 (Injury # 05-032159) merely aggravated his pre-existing back condition and did not, in and of itself, result in increased permanent disability.
- The Second Injury Fund is obligated to pay wage differential benefits in the amount of \$256.28 per week for a period of 120 weeks beginning June 1, 2006, and thereafter \$603.33 weekly for Claimant's lifetime.

### ANALYSIS

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. **Grime v. Altec Indus.**, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); see also **Davies v. Carter Carburetor**, 429 S.W.2d 738, 749 (Mo.1968); **McCoy v. Simpson**, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." **Sanderson v. Porta-Fab Corp.**, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing **Cook v. Sunnen Prods. Corp.**, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)). However, the employee must prove the nature and extent of any disability by a reasonable degree of certainty. **Downing v. Willamette Industries, Inc.**, 895 S.W.2d 650, 655 (Mo. App. 1995); **Griggs v. A. B. Chance Company**, 503 S.W.2d 697, 703 (Mo. App. 1974).

#### 1. Permanent Partial or Permanent Total Disability.

Section 287.020.7 RSMo. (2000) defines total disability as the "inability to return to any employment and not merely... [the] inability to return to the employment in which the employee was engaged at the time of the accident."

The words "inability to return to any employment" mean "that the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." **Kowalski v. M-G Metals and Sales, Inc.**, 631 S.W.2d 919, 922 (Mo. App. 1982). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition." **Id.** at 922; **Brown v. Treasurer of Missouri**, 795 S.W.2d 479, 483 (Mo. App. 1990). The primary determination for permanent-total disability is whether the claimant is able to compete in the open labor market given her physical condition and situation. **Messex v. Sachs Elec. Co.**, 989 S.W.2d 206, 210 (Mo.App. E.D. 1999).

Claimant testified he suffered an injury to his back on February 2, 2004 while moving a compressor. He sought medical treatment. The injury ultimately required surgical fusion in his low back. He testified that he has constant, severe pain in his back and radicular pain and numbness in his legs. Claimant further testified the pain limits his ability to function, both in a work environment and in his daily life.

Dr. Kennedy, in his deposition testimony, opined Claimant is, from a medical standpoint, permanently and totally disabled. While Dr. Kennedy took into account Claimant's subjective pain complaints, he indicated the anterior fusion required to repair the work injury, in conjunction with the posterior fusion necessitated by Claimant's previous surgery, severely limited Claimant's movement and would cause Claimant to continue to have pain. Dr. Kennedy also gave a sound explanation for Claimant's radicular pain symptoms in the absence of a positive nerve conduction and EMG study. Dr. Kennedy further described the effects of pain and medications on Claimant's cognitive abilities. Dr. Kennedy's opinions regarding Claimant's condition and treatment, and specifically regarding permanent disability are credible.

Timothy Lalk, in his deposition testimony, opined Claimant is permanently and totally disabled from a vocational standpoint. In reaching his opinion, Mr. Lalk took into account relevant factors such as Claimant's medical history, education, work history and presentation. Mr. Lalk's opinion regarding Claimant's employability in the open labor market is credible.

The facts that Claimant returned to work for two or three weeks until he re-injured his back on April 7, 2005, and that he can participate in some recreational activities, do not in and of themselves rebut the opinions of Dr. Kennedy and Mr. Lalk. Based on the competent and substantial evidence presented, it is reasonably certain that Claimant is permanently and totally disabled.

## 2. Liability of the Second Injury Fund.

Claimant testified he suffered a low back injury in January 1998 that required surgery. He further testified after that injury and surgery he continued to have pain, and returned to work subject to restrictions. He further testified he was injured on February 2, 2004. As a result of the February 2004 work injury, Claimant underwent a second surgery to his low back. His low back is now fused at both the L4-5 and L5-S1 levels. The second fusion had to be performed anteriorly as a result of the previous posterior L4-5 fusion.

Dr. Kennedy opined Claimant has a 35% PPD, with 25% attributable to the surgery from the 2004 work injury and 10% attributable to the 1998 surgery. In his testimony, Dr. Kennedy clearly establishes that his opinion is that Claimant is totally disabled as a result of the combination of the two injuries. He testified that the injury and fusion from 1998 made Claimant more susceptible to subsequent injury, which is what occurred in 2004. Dr. Kennedy further stated the posterior and anterior fusions together severely reduced the range of motion in all planes, and the loss of mobility itself can cause pain. Dr. Kennedy's opinion that Claimant is permanently and totally disabled as a result of the combination of the 1998 low back injury and the 2004 work injury is credible.

Claimant presented a prima facie case regarding permanent total disability and Second Injury Fund liability. He suffered a work injury; he presented credible medical and vocational evidence that he is in fact permanently and totally disabled. There was not sufficient evidence presented to rebut Claimant's evidence, therefore Claimant has met his burden of proof, and the Second Injury Fund is liable for payment of benefits as outlined above.

The compensation awarded to Claimant shall be subject to a lien of 25% of all payments rendered in favor of Attorney John J. Larsen, Jr. for necessary legal services provided on behalf of Claimant.

Date: September 15, 2008

Made by: /s/ GRANT C. GORMAN  
Grant C. Gorman  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ JEFFREY W. BUKER  
Jeffrey W. Buker, *Director*  
*Division of Workers' Compensation*