

**FINAL AWARD ALLOWING COMPENSATION**  
(Modifying the Award of the Administrative Law Judge)

Injury No.: 08-058428

Employee: Dennis Leonard  
Employer: Branson Granite & Marble, LLC  
Insurer: Guarantee Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have read the briefs, reviewed the evidence, and considered the whole record. We find that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision affirming the January 25, 2013, award and decision of the ALJ as modified herein. We adopt the findings, conclusions, decision, and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

The administrative law judge awarded future medical care to be directed by employee's primary care physician, Dr. Salmon. We believe that such an award is contrary to § 297.140.10 RSMo, which provides, in relevant part:

The employer shall have the right to select the licensed treating physician, surgeon, chiropractic physician, or other health care provider; provided, however, that such physicians, surgeons or other health care providers shall offer only those services authorized within the scope of their licenses. For purposes of this subsection, subsection 2 of section 287.030 shall not apply.

We agree with the ALJ's finding that "employee is entitled to future medical care to cure and relieve him of the effects of the injury he sustained on July 9, 2008." But we are not permitted to order future medical care to be directed or provided by a specific physician, unless an issue is presented under § 298.140.2 RSMo as to whether employee's life, health, or recovery is endangered such that an administrative law judge or this Commission may order a change in the physician, surgeon, hospital, etc. See, e.g., *Noel v. ABB Combustion Eng'g*, 383 S.W.3d 480, 485 (Mo. App. 2012). Because the parties have not presented any issue indicating § 287.140.2, an award of future medical care directed by Dr. Salmon would be inappropriate, as it would contravene employer's statutory right to direct treatment.

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri (2007), unless otherwise indicated.

Employee: Dennis Leonard

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Accordingly, we modify the ALJ's award of future medical treatment as follows. We conclude that employer has the right to direct future medical treatment. In all other respects, we affirm the award of the ALJ.

The Commission further approves and affirms the ALJ's allowance of attorney's fees herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Margaret Ellis Holden, issued January 25, 2013, is attached and incorporated by reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 29<sup>th</sup> day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: Dennis Leonard Injury No. 08-058428  
Dependents: N/A  
Employer: Branson Granite & Marble, LLC  
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund  
Insurer: Guarantee Insurance Company  
Hearing Date: 10/24/12 Checked by: MEH

### 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: 7/9/08
5. State location where accident occurred or occupational disease was contracted: TANEY COUNTY, 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: FELT PAIN IN HIS LOW BACK WHILE LIFTING A PIECE OF GRANITE.
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: BODY AS A WHOLE
14. Nature and extent of any permanent disability: PERMANENT AND TOTAL DISABILITY
15. Compensation paid to-date for temporary disability: \$17,333.46
16. Value necessary medical aid paid to date by employer/insurer? \$23,417.02

Employee: Dennis Leonard

Injury No. 08-058428

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$700
- 19. Weekly compensation rate: \$466.66/\$404.66
- 20. Method wages computation: BY AGREEMENT

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Unpaid medical expenses: N/A

2 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning 4/9/09, for Claimant's lifetime

- 22. Second Injury Fund liability: Yes No  Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:  
weekly differential (0) payable by SIF for 0weeks, beginning N/A  
and, thereafter, for Claimant's lifetime

**TOTAL: SEE AWARD**

- 23. Future requirements awarded:

**FUTURE MEDICAL TREATMENT**

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:

ROBERT BEEZLEY

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

Employee: Dennis Leonard Injury No. 08-058428  
Dependents: N/A  
Employer: Branson Granite & Marble, LLC  
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund  
Insurer: Guarantee Insurance Company  
Hearing Date: 10/24/12 Checked by: MEH

The parties appeared before the undersigned administrative law judge on October 24, 2012, for a final hearing. The claimant appeared in person represented by Robert Beezley. The employer and insurer appeared represented by Chris Moberg and Tymon Bay. The Second Injury Fund appeared represented by Barbara Bean. Memorandums of law were filed by November 23, 2012.

The parties stipulated to the following facts: On or about July 9, 2008, Branson Granite & Marble, LLC was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Guarantee Insurance Company. On the alleged injury date of July 9, 2008, Dennis Leonard was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. On or about July 9, 2008, the claimant sustained an accident which arose out of and in the course and scope of employment. The accident occurred in Taney County, Missouri. The claimant notified the employer of his injury as required by Section 287.420 RSMo. The claimant's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. At the time of the alleged accident, the

claimant's average weekly wage was \$700.00, which is sufficient to allow a compensation rate of \$466.66 for temporary total and permanent total disability compensation, and a compensation rate of \$404.66 for permanent partial disability compensation. Temporary disability benefits have been paid to the claimant in the amount of \$17,333.46, representing 37 1/7 weeks in disability benefits, ending on March 26, 2009. The employer and insurer have paid medical benefits in the amount of \$23,417.02. The attorney fee being sought is 25%.

#### ISSUES:

1. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.
2. Any temporary total benefits owed to the claimant from March 26, 2009, to April 2, 2010.
3. The nature and extent of permanent disabilities.
4. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The claimant is 47 years old. He is a high school graduate and also attended trade school to learn bricklaying. He has worked in the construction industry his entire career, going to work with his father as a hod carrier at age of 12. Claimant worked as a bricklayer from 1984 to 1998. Claimant is six foot four inches tall and weighs approximately 290 pounds.

Claimant had sustained other injuries before 2008. In 1993 claimant had a work-related injury while stacking blocks. He was picking them up and turning to set them down and felt pain in his low back. He settled this case for 9% of the body as a whole referencing the low back. In 1995 he was involved in an auto accident in which he broke his neck. As a result of this injury he had two fusion surgeries. The first did not properly fuse, requiring a second surgery using

hardware. The claimant testified that after this injury he was off work for 11 months. When he returned as a bricklayer he found he could not work as fast and keep up. Therefore he became self employed where he could work at a slower pace. He performed smaller jobs such as mailboxes and entry ways.

In 2000 he had a work-related injury when he fell from a ladder and injured his ribs, low back, left shoulder and left knee. He received 17.5% permanent partial disability to the body as a whole referenced to the back and 5% of the left shoulder and 5% of the left knee. In 2001 he had a work-related injury and injured his shoulder when a truck struck a mixer full of cement and he reached with his left hand to grab the mixer and felt a pop in his left shoulder. He received 15% permanent partial disability for this injury.

In 2001 the claimant's parents opened Branson Granite and Marble in Branson, Missouri, and asked him to run this business for them. His duties included acting as a shop supervisor but he was also involved on a day-to-day basis of measuring, cutting, fabricating, and installing granite and marble. He testified that in this position he had people working under him. He said he could run the saw but could not pick up items without others helping him. He could also carry with help. He could bend and squat but not for long periods of time. He could not do overhead work. He worked forty plus hour weeks. Also he could go home and rest if he needed to, which he did once or twice a month. He took over the counter pain medication when needed.

Claimant testified that in spite of these prior injuries and conditions, however, he was very athletic. He exercised daily including riding a bike, doing a lot of walking, and he played golf, half court basketball, softball, and touch football. His mother testified at the hearing that between 2002 and 2003 she built a home. She said the claimant laid thousands of square feet of

stone in the house by himself in the year and a half it took to build. She also said that he worked 8-10 hours a day and did not complain.

On July 9, 2008, claimant was injured in an occurrence while working within the course and scope of his employment at a home in Branson, Taney County, Missouri. The claimant was helping three others carry a large piece of granite up the stairs in a home. The claimant testified it was a large L shaped piece. It was in a clamp which they rolled onto a stairway and then had to pull it up and turn a 90 degree angle. They had difficulty getting it in and up the stairs. They had to hold it off the ground because they did not want to damage the floor or the granite by setting it down. He felt a pain in his lower right back. He had to sit down and was having problems walking. He went home and did not work the next couple days. His pain continued and on July 11, 2008, he was taken to the hospital by ambulance.

He treated at Skaggs Community Health Center and Skaggs Occupational Health Clinic. An MRI was performed on July 22, 2008. It showed "marked facet arthropathy without neural impingement" at L4-5, and at L5-S1 "there is a small central zone disc protrusion with enhancement at the posterior margin. There is contact but no displacement of the right S1 nerve root. Although this may be site of laminectomy, no laminectomy tract is demonstrated. Alternatively this could represent a disc protrusion with annular tear. Correlate with surgical history." Claimant underwent therapy but continued to have low back and bilateral leg pain. He was referred to a neurosurgeon, Dr. Robert Strang at Springfield Neurological and Spine Institute.

Dr. Strang reviewed the results of an MRI that was performed on July 22, 2008, which demonstrated an annular tear at the level of L5-S1. Claimant was complaining of pain over his lower lumbar spine with radiation of pain and numbness into the right leg and into the right foot.

Dr. Strang felt that because of claimant's weight and other issues, surgery should not be performed and that conservative treatment was needed. He had claimant on modified duty with a 10 pound weight restriction. In October 2008 he saw claimant for a follow-up on physical therapy. Claimant stated that his symptoms were unchanged and continued to have pain in the low back radiating into his legs. He referred him to Dr. Ted Lennard, a physiatrist at Springfield Neurological and Spine Institute.

Dr. Lennard performed both epidural and facet injections. Dr. Lennard also prescribed physical therapy for the claimant. Claimant received physical therapy at Functional Individualized Therapy from Oct. 28, 2008 to March 9, 2009. Neither the epidural or facet injections nor the physical therapy provided any long lasting relief or improvement in the employee's condition with respect to his back and leg pain.

On April 9, 2009, Dr. Lennard felt that claimant had reached maximum medical improvement and released him with a 40 pound lifting restriction. Dr. Lennard assessed 10% permanent partial disability at the back and attributed 5% to the July 9, 2008, work injury. Claimant had also continued to follow-up with Dr. Strang during this time. On January 23, 2010, another MRI was performed. Dr. Strang found claimant to be at maximum medical improvement on January 25, 2010, after reviewing the MRI which showed no significant change from the prior one.

On April 2, 2010, Dr. Robert Paul examined the claimant at the request of claimant's attorney. Claimant gave a history of sharp, stabbing and constant pain in his back together with cramps and right lower extremity pain since the July 9, 2008, accident. He walked with an antalgic gait because of the right leg pain and there was tenderness and spasticity in his lumbar spine. He had decreased sensation on the top and the outside of his right foot and decreased

strength in his ankle. Dr. Paul was of the opinion that the claimant had sustained an annular tear at L5-S1 with right sided S1 nerve root encroachment as demonstrated on the MRI and EMG and CV nerve conduction studies. Dr. Paul placed permanent workplace restrictions on the claimant. Dr. Paul indicated that the claimant could stand or walk 15 minutes at a time, sit for 20 minutes at a time, and could lift and carry 10 pounds on an occasional basis. The claimant would have to change positions every 20 minutes to relieve pain. He also said claimant would need to lie down and recline one-half hour to one hour in the morning and also in the afternoon because of his chronic low back and right leg pain due to the July 9, 2008, injury only. Dr. Paul testified that all of these limitations were only from the low back injury sustained on July 9, 2008.

Dr. Paul concluded claimant had sustained a 20% permanent partial disability to the body as a whole as a result of the July 2008 injury. He also found claimant had pre-existing permanent partial disability of 24% to the body as a whole related to his lumbar spine, 30% to the body as a whole related to the cervical spine, and 15% at the level of the left shoulder. He also found that claimant was permanently and totally disabled as a result of the last injury and his prior disabilities in combination. In his deposition, Dr. Paul testifies that he did not have any indication that claimant was having any difficulty performing his job, sitting, standing, walking, or had a need to lie down daily due to low back and leg pain. He confirmed that all his limitations and restrictions, including the need to lie down daily, were due to the July 9, 2008, injury. His opinions are credible with respect to the limitations of claimant and the fact that those limitations are due to the injuries sustained in the accident of July 9, 2008.

Claimant's treating physician, Dr. John Salmon, currently administers his medications and has seen the claimant both before and after the accident of July 9, 2008. In October 2010, after the July 2008 accident, Dr. Salmon provided his opinions concerning claimant's residual

functional capacity. Dr. Salmon stated that in his opinion the claimant needed to lie down several times in a day and could occasionally lift and carry 11 to 20 pounds and frequently lift and carry up to 10 pounds. The claimant could sit for 20 minutes and could stand for 10. He testified that these limitations were due to the July 9, 2008, injury only, not due to any pre-existing condition.

. Dr. Salmon has prescribed claimant pain medications of OxyContin, Alprazolam and Hydrocodone for pain since claimant's accident of July 9, 2008. He has also diagnosed the claimant with diabetes since the accident and prescribes him oral medication. Claimant continues to take the above medications at this time.

Phil Eldred, a certified vocational rehabilitation counselor testified by deposition. He evaluated the claimant and issued a report on April 7, 2011. He interviewed the claimant, performed vocational testing, and reviewed medical records and reports. He testified that as a result of the restrictions imposed by the physicians, claimant is at the less than sedentary work level. He concluded that the claimant was permanently and totally disabled as a result of a combination of the last injury and his prior disabilities. He said "so, with the scenario of if he could even do sedentary work, which according to the functional limitations he can't, but on the top if you assume he could, he would still be unable to return to his previous jobs, which were in the medium and heavy work levels, there would still be no transferable jobs at the sedentary work level." He also felt claimant would not be retrainable due to his functional limitations, low test scores, and the fact that he is on narcotic pain medication. He also found no unskilled jobs the claimant could do. Mr. Eldred concluded claimant was unemployable in the open labor market. On cross-examination he was asked about the restriction imposed by Dr. Paul requiring the claimant to lie down during the day to relieve pain and Mr. Eldred testified that there was no job in the open labor market that would allow claimant to lie down.

James England, a certified vocational rehabilitation counselor, testified by deposition. Mr. England evaluated the records of the claimant and issued a report on January 18, 2012. He reviewed medical records and reports, claimant's deposition, and Mr. Eldred's report. He noted the restrictions imposed by Dr. Lennard and Dr. Paul as well as the fact that claimant uses narcotic pain medication since the July 9, 2008, injury.

Mr. England testified that if he considered only Dr. Lennard's restrictions claimant could still perform sedentary to light work, and probably even some jobs in the medium work range. He said "on the other hand, I think with Dr. Paul's restrictions, I do not believe the man would be employable in the open labor market, but I think that would be true just due to the effects of the primary injury when one considers Dr. Paul's statement that the 2008 injury alone would cause him to have to lie down at least twice a day to deal with pain. I think if someone's having that level of pain and having to lie down during the day, that would preclude a person's ability to sustain regular work activity." He indicated that despite some earlier significant physical problems, the claimant was able to work before the last accident, doing at least medium work activity until the time he was injured in July 2008.

After carefully considering all of the evidence, I make the following rulings:

1. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.

I find that the employee is entitled to future medical care to cure and relieve him of the effects of the injury he sustained on July 9, 2008. Dr. Paul has indicated that medications are needed for the treatment of the claimant's pain in the future. The pain medications of Vicodin and Hydrocodone have been ordered by his primary care doctor, Dr. Salmon, following the accident of July 9, 2008 through the present date and will in the future, as well as the need for periodic physician visits in the future to monitor medications and make adjustments in dosages.

I find that future medical care should be directed by the employee's primary care doctor, Dr. John Salmon, who has treated the employee for his low back and right leg pain following the provision of authorized treatment in this case.

2. Any temporary total benefits owed to the claimant from March 26, 2009, to April 2, 2010.

Dr. Lennard placed claimant at MMI on April 9, 2009. Dr. Paul placed claimant on MMI on April 2, 2010. I find claimant was at maximum medical improvement as of Dr. Lennard's release on April 9, 2009. Claimant is awarded 2 weeks of temporary total disability.

3. The nature and extent of permanent disabilities.

Both Dr. Lennard and Dr. Paul agree that the claimant sustained an annular tear with S-1 radiculopathy as a result of accident occurring on July 9, 2008. The claimant has restrictions imposed by Dr. Lennard of no lifting over 40 pounds. Dr. Paul limits claimant to stand or walk 15 minutes at a time, sit for 20 minutes at a time and lift and carry 10 pounds on an occasional basis. He also said the claimant would have to change positions every 20 minutes to relieve pain and would need to lie down and recline one-half hour to one hour in the morning and also in the afternoon because of his chronic low back and right leg pain. These restrictions are due to the July 9, 2008, injury only. Dr. Salmon, claimant's treating physician, also has the opinion the claimant needed to lie down several times in a day and could occasionally lift and carry 11 to 20 pounds and frequently lift and carry up to 10 pounds. The claimant could sit for 20 minutes and could stand for 10. He testified that these limitations were due to the July 9, 2008, injury only, not due to any pre-existing condition.

While it is clear that the claimant had significant injuries and medical conditions prior to July 9, 2008, he had no work restrictions imposed as the result of any of his pre-existing conditions. While these previous conditions affected the speed he could work and the amount he

could lift, he nevertheless he had been able to return to work performing at least a medium level work activity.

Although Dr. Paul and Mr. Eldred conclude claimant is permanently and totally disabled as a result of a combination of his injuries, upon closer inspection, the basis for their opinion is only the restrictions in place due to his last injury. Mr. England finds claimant is permanently and totally disabled because of the last injury due to these same restrictions, most specifically the need to lie down to relieve his pain.

Therefore, although claimant had significant prior injuries with residual disabilities, I find that he is permanently and totally disabled based on the limitations and restrictions resulting from the last accident of July 9, 2008, alone. The employer and insurer are hereby responsible for permanent total disability at the rate of \$466.66 from the date claimant reached maximum medical improvement, April 9, 2009, to the present and into the future according to law.

4. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

I find the claimant is permanently and totally disabled from the last injury on July 9, 2008, alone, without any combination with any pre-existing disability. Therefore, the Second Injury Fund has no liability.

Attorney for the claimant, Robert Beezley, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Made by: /s/ Margaret Ellis Holden  
Margaret Ellis Holden  
Administrative Law Judge  
Division of Workers' Compensation