

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

Injury No.: 04-145940

Employee: Delbert Lewis
Dependent: Jeanine Lewis
Employer: Gerstner Electric, Inc. (Settled)
Insurer: Transportation Insurance Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: June 24, 2004
Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 13, 2007. The award and decision of Administrative Law Judge Margaret D. Landolt, issued November 13, 2007, 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 24th day of June 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Delbert Lewis Injury No.: 04-145940
Dependents: Jeanine Lewis Before the
Employer: Gerstner Electric Inc. (settled) **Division of Workers'**
Compensation
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Transportation Insurance Co.
Hearing Date: September 5, 2007 Checked by: MDL: ms

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
 - Date of accident or onset of occupational disease: June 24, 2004
 - State location where accident occurred or occupational disease was contracted: St. Louis, 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? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
 - Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee performed repetitive motions with his upper extremities.
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: Both wrists
 - Nature and extent of any permanent disability: 20% PPD of each wrist with a 10% multiplicity factor

previously paid by Employer.

15. Compensation paid to-date for temporary disability: None

16. Value necessary medical aid paid to date by employer/insurer? \$14,802.23

Employee: Delbert Lewis

Injury No.: 04-145940

17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: \$1,000.00

19. Weekly compensation rate: \$662.55/\$347.05

20. Method wages computation: Pursuant to statutes

COMPENSATION PAYABLE

21. Second Injury Fund liability: Yes

65.01 weeks of permanent partial disability from Second Injury Fund \$22,561.72

Total: \$22,561.72

22. Future requirements awarded: N/A

Said payments to begin 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: Mr. Dean Christianson

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Delbert Lewis

Injury No.: 04-145940

Dependents: Jeanine Lewis

Before the
Division of Workers'

Employer: Gerstner Electric Inc. (settled)

Compensation

Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri
Jefferson City, Missouri

Insurer: Transportation Insurance Co.

Checked by: MDL:ms

PRELIMINARIES

A hearing was held on September 5, 2007, at the Division of Workers' Compensation in the city of St. Louis. Delbert Lewis (Claimant) was represented by Mr. Dean Christianson. Gerstner Electric Inc., and its insurer Transportation Insurance Company previously settled their liability with Claimant. This case proceeded to a hearing against the Second Injury Fund (SIF) which was represented by Assistant Attorney General Michael Finneran. Mr. Christianson requested a fee of 25% of Claimant's award.

The parties stipulated that on or about June 24, 2004, Claimant was an employee of Employer, venue is proper in the city of St. Louis, and the claim was timely filed.

ISSUES

The issues for resolution by hearing are: occupational disease; medical causation; nature and extent of PPD sustained by Claimant; whether Claimant is permanently and totally disabled; rate of compensation; and liability of the Second Injury Fund.

SUMMARY OF EVIDENCE

Claimant is a 55 year old high school graduate with no additional education. Claimant has been married to his wife Jeanine Lewis for 35 years. Claimant and his wife have two sons, neither of whom were dependent upon him for support in June 2004, or at the present time. Claimant has fathered no other children. Claimant used his paycheck for household expenses for himself and his wife. In June 2004, his wife also worked outside the home, and used her paycheck for the support of her and Claimant.

Following high school, Claimant worked in the electrical field exclusively, except for occasional periods when he was laid off, at which time he temporarily worked for his father's fence company.

Claimant was a groundman operator. His work as a groundman operator included operating a backhoe, boom truck, cranes, bulldozers, and high lifts. Claimant began working for Employer in 1998. The majority of his time was spent operating machines, although he did some shoveling and jack hammering. Claimant testified in June 2004, he made at least \$25.00 per hour, which was the top operator's scale. Claimant worked a forty hour week with occasional overtime.

Claimant occasionally operated a 75 to 100 pound jack hammer, and worked with shovels almost every day. He operated all of the equipment until the last couple of years when he operated a backhoe. Claimant constantly moved levers all day with his hands. The operation of the backhoe produced a lot of vibration. Also, on the boom truck there was some vibration while Claimant was operating the levers.

Claimant began experiencing symptoms in his hands in approximately 2001 or 2002. Claimant was referred to Dr. Crandall for treatment. Following a nerve conduction study which revealed severe left and right carpal tunnel syndrome, bilateral carpal tunnel releases were recommended. Dr. Crandall noted based upon Claimant's description of his job, it was theoretically possible his job was considered hand intensive. Claimant underwent bilateral carpal tunnel releases in February and March 2006. Following a course of physical therapy, Dr. Crandall released Claimant at MMI with no restrictions on September 6, 2006. Dr. Crandall rated Claimant with a 10% PPD referable to each wrist.

At Claimant's last physical examination by Dr. Crandall on September 6, 2006, Claimant reported a good result, but some residual symptoms including occasional symptoms when he drove. Upon examination, Dr. Crandall

found a negative Tinel sign, negative Phalen's test, and negative Finklestein's test on both hands. There was a negative provocative test bilaterally, and no evidence of ganglions, trigger fingering, or thenar muscle atrophy.

Claimant was evaluated by Dr. Lichtenfeld, a family practice physician on November 30, 2006. He complained to Dr. Lichtenfeld of extensive symptoms in each hand. He complained both wrists hurt all the time. Dr. Lichtenfeld's physical examination revealed equivocal Tinel's signs, positive reverse Phalen's tests and positive pressure tests. Dr. Lichtenfeld rated Claimant with a 37.5% PPD referable to each wrist.

Claimant settled his claim with Employer for 20% PPD of each wrist with a 10% load factor, and three weeks disfigurement. Claimant resigned his job with Employer on June 24, 2004. Claimant was not pressured to resign, and he left Employer of his own volition.

Claimant states his hand and wrists began bothering him two or three years before he terminated his employment with Employer on June 24, 2004, but he never asked anyone for treatment until after he quit working for Employer and filed his Claim for Compensation.

Prior Injuries

In 1993, Claimant injured his back while using an auger. He filed a Workers' Compensation Claim alleging a lumbar strain. This claim settled for 14% PPD of the body as a whole.

In 1995, Claimant strained his back again while using a jack hammer. He underwent conservative treatment, and during the course of treatment was diagnosed with severe chronic degenerative joint disease. He settled a Workers' Compensation Claim for this injury for 3.5% PPD of the body as a whole. Claimant was also involved in a motor vehicle accident in 1995, and alleged injury to his middle back as a result of the accident.

Claimant was injured in 1999 while he was working in a parked boom truck on the shoulder of Interstate 70. An automobile rear-ended his work truck, and Claimant dropped from the boom approximately eight feet to the windshield of the automobile. Claimant was taken to St. Louis University Hospital Emergency Room where he was treated with pain medication and released.

Claimant's back pain persisted, and he was treated several days later at St. John's Hospital in Washington, Missouri. X-ray's indicated he sustained fractures of the transverse processes at L1, L2, and L3. Claimant underwent conservative treatment, and was released to return to work on April 20, 1999.

Claimant complained of ongoing pain, and was referred to Dr. Chabot who recommended injection therapy, medication, and physical therapy. Claimant saw Dr. Chabot several times in 1999, and was eventually released from Dr. Chabot's care on December 20, 1999 with no work restrictions. Dr. Chabot opined Claimant's ongoing complaints were not associated with his work injury, but rather due to obesity and muscle deconditioning.

Claimant saw Dr. Jacob in 2000 with complaints of neck and shoulder pain. MRI and myelogram/CT scans of Claimant's cervical and lumbar spines revealed spondylosis and degenerative changes from C4 thru C7, and a possible herniation at C6-C7. Claimant was diagnosed with adhesive capsulitis of the left shoulder, and following a series of steroid injections and physical therapy, underwent an excision of calcific tendonitis in April 2000. Claimant was released to return to work with no restrictions in May 2000.

Claimant returned to Dr. Jacob in November 2000 with complaints of neck pain and progressive weakness in the right upper extremity. Claimant underwent a cervical spine decompression with foraminotomy and fusion at C5-6 and C6-7 in October 2000. Claimant had an excellent result from this procedure, and was released to return to work with no restrictions on January 24, 2001.

Claimant saw Dr. Feinstein in April 2001 with complaints of painful right shoulder rotation. Dr. Feinstein diagnosed a small, full thickness rotator cuff tear, a small ganglion cyst, and moderate degenerative changes. Claimant

underwent surgical repair of the right rotator cuff and impingement syndrome on May 3, 2001. Claimant was released to return to work full duty on July 9, 2001, but returned four days later complaining of a recurrence of right shoulder symptoms. Dr. Feinstein administered another injection.

Claimant continued to have problems with his right shoulder, and ultimately another arthroscopic procedure was performed in August 2002. Claimant was again released to return to work with no restrictions in September 2002. Claimant received another right shoulder injection from Dr. Sedwick in October 2003.

Claimant saw Dr. Kennedy in July 2003 with complaints of continuing low back pain radiating into the left anterior thigh. Dr. Kennedy recommended epidural steroid injections which were performed by Dr. Smith. Claimant continued to complain of left leg pain. He underwent another lumbar and cervical spine MRI. The MRI indicated degenerative changes, a small spinal canal and paramedian protrusion at L2-3 of uncertain significance. The MRI further noted the prior C5-6, C6-7 fusion along with degenerative changes at C3-4 and C4-5.

Currently Claimant complains of constant pain in his cervical spine which is aggravated by almost any activity. Claimant reported having to lie down frequently throughout the day. Claimant has constant pain in his low back which is aggravated by activity. Claimant has constant pain in his shoulder. Claimant testified he is unable to do much in a typical day. He has difficulty walking. He no longer mows his lawn, performs work around the house, or travels. Although he still drives, he reports pain in his hands.

Opinion Evidence

In May 2004, Claimant was evaluated by Dr. Yadava at the request of Claimant's attorney. Dr. Yadava performed an extensive independent medical examination and medical records review. Dr. Yadava diagnosed Claimant with status post cervical spine decompression; status post left shoulder arthroscopy/decompression; status post right shoulder arthroscopy/decompression times two; chronic trapezial myofascitis; chronic thoracolumbar strain; and mechanical low back pain. Dr. Yadava felt Claimant's described level of impairment was somewhat disproportionate to his objective physical findings. According to Dr. Yadava, this was further corroborated by a high level of perceived disability revealed in Claimant's pain questionnaire. Dr. Yadava stated he saw nothing in his evaluation that would suggest to him Claimant could not continue to perform his job duties in a successful manner. Dr. Yadava felt Claimant had reached the point of MMI.

Claimant was evaluated by Dr. Lichtenfeld in August 2004 at the request of his attorney. Dr. Lichtenfeld rated Claimant with 40% PPD of the right shoulder, 37.5% PPD of the left shoulder, 60% PPD of the body as a whole referable to the cervical spine, and 40% PPD of the body as a whole with regard to the lumbar spine. He further recommended a loading factor of 12.5% to the bilateral shoulder injuries, as well as to the cervical lumbar spine disabilities. Dr. Lichtenfeld also found Claimant suffered from a 12.5% PPD of the body as a whole pre-existing disability to his lumbar spine, 30% PPD of the body as a whole related to controlled hypertension, and 5% PPD of the body as a whole related to polyps in the colon. Dr. Lichtenfeld concluded that in August 2004 Claimant was permanently and totally disabled and unable to compete in the open labor market due to a combination of his 1999 injury and his pre-existing injuries.

Dr. Lichtenfeld testified Claimant should have work restrictions of lifting only between the waist and shoulder height and limit his lifting to 30 to 35 pounds on a one time basis and 15 to 20 pounds on a repetitive basis. He testified Claimant should avoid working with arms outstretched or over head. Claimant should perform no lifting from the ground level to the waist level, nor from the shoulder level overhead. He should avoid operating any type of gas, electric, or air powered tools and rapid movements of the cervical or lumbar spine, and should avoid operating heavy and dangerous equipment. He should avoid stooping, twisting, bending, and prolonged sitting for more than 10 to 20 minutes at a time without alternating positions, and should avoid prolonged rides or driving motor vehicles as well as prolonged walking.

On October 26, 2004, Claimant was evaluated by Timothy Lalk, a vocational rehabilitation counselor, at the request of Claimant's attorney. Mr. Lalk indicated if Dr. Yadava's medical analysis was correct, then Claimant would be able to return to his regular occupation. On the other hand, he opined if the restrictions set forth by Dr. Lichtenfeld and Claimant's self reporting of symptoms were accurate, then he should be considered permanently and totally disabled, and unable to compete in the open labor market.

Timothy Lalk re-evaluated Claimant on February 16, 2007. Mr. Lalk reviewed additional medical records and re-interviewed Claimant. Mr. Lalk stated were he to consider the opinions of Dr. Yadava, and combine them with the lack of restrictions imposed by Dr. Crandall, he would again conclude there was nothing preventing Claimant from either returning to his former position operating heavy equipment, or from pursuing lighter work.

Mr. Lalk stated based upon the restrictions imposed by Dr. Lichtenfeld on November 20, 2006, Claimant would be restricted to jobs at the sedentary or near sedentary level of physical exertion, which did not require work below waist level or above shoulder level. This would include positions such as desk clerk, store cashier, unarmed security guard, information clerk, and a variety of customer service positions. However, Mr. Lalk stated based upon the symptoms and limitations reported by Claimant, he would be unable to engage in any level of work, even at a sedentary level of employment. Mr. Lalk therefore concluded Claimant would not be able to secure and maintain employment in the open labor market or compete for any position.

Dr. Lichtenfeld re-evaluated Claimant on November 20, 2006. Dr. Lichtenfeld testified Claimant was permanently and totally disabled as a result of the carpal tunnel syndrome combined with his pre-existing injuries.

Procedural History

On June 28, 2005, Claimant's claim on his February 1999 work injury was heard by Administrative Law Judge Matthew D. Vacca. On August 9, 2005, Claimant filed a Claim for Compensation for the primary injury in which he alleged injury to both wrists, arms, and the body as a whole due to repetitive activities. On August 31, 2005, ALJ Vacca issued an award on injury number 99-017897. ALJ Vacca denied the claim for permanent total disability benefits, and awarded Claimant 20% PPD to the body as a whole from Employer, due to the injury of February 4, 1999. This was for transverse process fractures and pelvic and thoracic bruising. ALJ Vacca further awarded Claimant 22.5 weeks of additional PPD benefits from the Second Injury Fund, finding Claimant had a pre-existing disability of 17.5% PPD referable to the spine and using a loading factor of fifteen percent.

On September 20, 2005, Claimant filed an Application for Review of ALJ Vacca's award. However, subsequent to filing his Application for Review, Claimant entered into a Stipulation for Compromise Settlement with Employer for his February 1999 work injury. Employer agreed to pay Claimant a lump sum amount of \$92,368.38 based upon an approximate disability of 30% of the right shoulder, 27.5% of the left shoulder, 25% of the low back, and 20% of the neck. The settlement was approved by the LIRC on December 15, 2005. On February 14, 2006, Claimant filed A Motion to Dismiss his Application for Review which was granted on February 22, 2006.

FINDINGS OF FACT and RULINGS OF LAW

Based upon my observations Claimant at hearing, a comprehensive review of the evidence and the application of Missouri Law I find:

Claimant met his burden of proving he sustained a compensable occupational disease to both wrists based upon repetitive trauma. Dr. Crandall indicated based upon Claimant's description of his job it is theoretically possible Claimant's work could be hand intensive. Claimant's testimony regarding his job description was not refuted. I find Claimant sustained 20% PPD referable to each wrist. Claimant settled with Employer for this amount, and the evidence supports this level of disability.

Claimant is not permanently and totally disabled. Considering Dr. Yadava's opinion, combined with Dr. Crandall's release of Claimant to return to work with no restrictions referable to the hands, Claimant is able to either

return to the type of work he formerly performed, or to the work of a less demanding physical job. The claim for permanent total disability benefits is denied.

Of the evaluations of Claimant's condition prior to June 24, 2004, Dr. Yadava's is the most persuasive. Dr. Yadava's services were secured by Claimant's attorney, not Employer. I find Dr. Crandall's examination findings and release of Claimant to return to work without restrictions for his hands more persuasive than the opinion of Dr. Lichtenfeld on this subject. Dr. Crandall is a treating physician who regularly performs carpal tunnel surgeries, compared to Dr. Lichtenfeld, who is a family practice physician, and has no expertise in the treatment of carpal tunnel syndrome.

Claimant met his burden of proving entitlement to PPD benefits from the Second Injury Fund pursuant to § 287.220.1 RSMo.2000. Prior to the onset of Claimant's primary injury, he had pre-existing disabilities of: 30% of the right shoulder, 37.5% of the body as a whole referable to the low back, 20% of the body as a whole referable to the neck, and 27.5% of the left shoulder.

Claimant's primary and pre-existing disabilities combine synergistically to create a greater overall disability. A loading factor of 15% should be applied. Claimant is entitled to 65.01 weeks of compensation for PPD benefits from the Second Injury Fund.

Based upon Claimant's testimony, his average weekly wage is \$1,000.00 a week. This is based upon a 40 hour work week at the rate of \$25.00 per hour. This is sufficient to entitle him to compensation at the statutory maximum for the date of injury, which is \$347.05 for PPD benefits and \$662.55 for PTD benefits. Claimant is awarded \$22,561.72 from the Second Injury Fund.

This award is subject to an attorney's fee in the amount of 25% from Claimant's attorney Mr. Dean Christianson.

Date: _____

Made by: _____

Margaret D. Landolt
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation