

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

Injury No.: 99-181715

Employee: Arthur Liberty
Employer: Owens Corning (Settled September 15, 2004)
Insurer: Insurance Company of Pennsylvania (Settled September 15, 2004)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: Alleged August 22, 1999
Place and County of Accident: Alleged Kansas City, Wyandotte County, Kansas

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 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 July 18, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge R. Carl Mueller, Jr., issued July 18, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 29th day of March 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD DENYING COMPENSATION

Employee: Arthur Liberty

Injury No: 99-181715

Dependents: N/A
Employer: Owens Corning (Settled September 15, 2004)
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Insurer: Insurance Company of the State of Pennsylvania (Settled September 15, 2004)
Hearing Date: June 13, 2005
Briefs Filed: June 29, 2005
Checked by: RCM/rm

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: Alleged, August 22, 1999
5. State location where accident occurred or occupational disease was contracted: Alleged, Kansas City, Wyandotte County, Kansas
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? No.
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: Employee alleged that he injured his low back and body as a whole from the repetitive performance of his job duties as a maintenance worker, *e.g.*, running clip hammers, operating forklifts, unloading trucks, sandblasting and water blasting.
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: Alleged body as a whole
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: N/A - issue moot as claim denied
19. Weekly compensation rate: N/A - issue moot as claim denied
20. Method wages computation: N/A - issue moot as claim denied.
21. Compensation Payable: None
22. Second Injury Fund liability: None
23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Arthur Liberty Injury No: 99-181715
Dependents: N/A
Employer: Owens Corning (Settled September 15, 2004)
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Insurer: Insurance Company of the State of Pennsylvania (Settled September 15, 2004)
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On June 13, 2005, the Employee and the State Treasurer as Custodian of the Second Injury Fund (Fund) appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Mr. Arthur Liberty, appeared in person and with counsel, Shelly Naughtin. The Fund appeared through Assistant Attorney General David Van Compernelle and Meredith Moser, law intern. The primary issue the parties requested the Division to determine was whether or not the Fund was liable for any benefits pursuant to §287.220. For the reasons noted below, I find that Mr. Liberty failed to sustain his burden of proving either Missouri jurisdiction or qualification for Second Injury Fund benefits.

STIPULATIONS

The parties stipulated that:

1. On or about August 22, 1999, Mr. Liberty was an employee of Owens Corning; and,

2. This hearing could be conducted, in Kansas City, Missouri without the Fund waiving its jurisdictional objections.

ISSUES

The parties requested the Division to determine:

1. Whether Owens Corning was an employer operating subject to Missouri Workers' Compensation law?
2. Whether Mr. Liberty was an employee working subject to Missouri Workers' Compensation law?
3. Whether Mr. Liberty sustained an accident arising out of and in the course of his employment?
4. What was Mr. Liberty's average weekly wage and compensation rates?
5. Whether Mr. Liberty notified Owens Corning of his alleged injury as required by law?
6. Whether Mr. Liberty's claim was filed within the time allowed by law?
7. Whether Mr. Liberty suffered any disability, and, if so, the nature and extent of his disability and whether he is permanently and totally disabled?
8. Whether the Fund is liable for providing Mr. Liberty with any benefits pursuant to §287.220?

FINDINGS

Mr. Liberty testified on his own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

- Exhibit A – Deposition, Dr. Brent Koprivica, 10/12/2004
- Exhibit B – Report, Dr. Brent Koprivica, 8/13/2002
- Exhibit C – Report, Dr. Brent Koprivica, 8/10/2003
- Exhibit D – Report, Dr. Brent Koprivica, 8/30/2004
- Exhibit E – Report, Mary Titterington, 5/19/2003
- Exhibit F – Medical Records, North Kansas City Hospital
- Exhibit G – Medical Records, Dr. Thomas A. Janes
- Exhibit H – Medical Records, Kansas City Neurosurgery Group
- Exhibit I – Medical Records, Kansas City Neurosurgery Group
- Exhibit J – Medical Records, Shawnee Mission Medical Center
- Exhibit K – Medical Records, Northeastern Neurological Surgery
- Exhibit L – Medical Records, Independent Orthopaedics and Sports Medicine
- Exhibit M – Medical Records, Independent Orthopaedics and Sports Medicine
- Exhibit N – Medical Records, Liberty Hospital
- Exhibit O – Medical Records, Excelsior Springs Medical Center
- Exhibit P – Medical Records, Dr. Sidney Cantrell
- Exhibit Q – Medical Records, Dr. Sidney Cantrell
- Exhibit R – Deposition, Mary Titterington, 5/25/2005

Although the Second Injury Fund did not call any witnesses, it did present the following exhibits, all of which were admitted into evidence:

- Exhibit 1 - Claim for Compensation, 4/25/01
- Exhibit 2 - Letter requesting consent to see a SIF doctor, 6/19/01
- Exhibit 3 - Stipulation of Compromise Settlement, 9/15/04
- Exhibit 4 - Report of Dr. Swaim, 3/22/05
- Exhibit 5 - Curriculum Vitae of Dr. Swaim
- Exhibit 6 - Deposition of Dr. Swaim, 5/26/05
- Exhibit 7 - Deposition of Mr. Liberty, 3/19/04

No objections were made to Exhibits 1-5 and 7; objections contained in the deposition of Dr. Swaim were renewed but are overruled.

Based on the above exhibits and the testimony of Mr. Liberty, I make the following findings.

Mr. Liberty is a married, 58-year old male, who lives in Lawson, Missouri. He and his wife have two, adult children, ages 33 and 29. He attended Sacred Heart High School through his sophomore year. He received his G.E.D. from Maple Woods Junior College in 1974. He has not completed any other formal education. Mr. Liberty began working for Owens Corning ("OC") on January 8, 1968. He worked until April of that year and then because of family issues and his father's poor health temporarily moved to Nebraska to help with his father's farm. He testified in his deposition that he simply stopped going in to work. He did not formally resign and he was never formally terminated. Approximately eight months later in December of 1968, Mr. Liberty returned to his employment at OC. Mr. Liberty continued to work for OC until August 22, 1999, the day before his first and only back surgery was scheduled. Prior to working for OC in 1968, Mr. Liberty served in the U.S. Army from 1966-1968 as a communications worker. He testified that he did not have any injuries, illnesses, or conditions prior to starting with OC.

Mr. Liberty held five different positions during his tenure with OC: packer, janitor, spinner/driller, disposal vehicle operator, and service attendant group leader. Mr. Liberty testified on direct examination that he was first hired by OC on December 20, 1968 and continued in varying positions with them until his last day on August 22, 1999. On direct examination, he testified that after a call from one of his brothers, Mr. Liberty interviewed with Luther McCaren at OC's Kansas City, Kansas production plant. Mr. Liberty testified that he was called at his brother's house in North Kansas City, Missouri and told that he had the job. However, on cross-examination, Mr. Liberty revealed that he had nine brothers. He lived with several different brothers at various times after leaving the Army; and, although he claims to remember which brother he was staying with at the time, he did get confused on cross-examination as to where that brother lived. At his deposition he gave a different general location than he did at the hearing. He could not remember the address where his brother lived; he could not remember his brother's phone number. Mr. Liberty also revealed that he had worked for OC on another occasion in January of 1968. At that time, Mr. Liberty went to a group interview of fifteen to twenty people at OC's production plant in Kansas City, Kansas, and was hired to come to work in a couple of days, following a chest x-ray he was asked to provide to employer. The x-ray location was in Kansas City, Kansas. Mr. Liberty never quit during the period between the beginning and end of 1968, but he stopped going into the plant when he moved to Nebraska in April 1968. He also testified that he was never fired.

Mr. Liberty worked for OC as a janitor. In that capacity, Mr. Liberty cleaned floors, cleaned the cafeteria and emptied trash. He testified that he had no workplace injuries during that time period.

In approximately 1973 or 1974, Mr. Liberty moved to the "spinner room" area of OC's Kansas City, Kansas facility. Mr. Liberty's job during this time was to work at a machine as part of a production line. In the fall of 1978, Mr. Liberty slipped on his left foot and hurt his back below the beltline. (There was some discrepancy of testimony, Mr. Liberty's recollection in live testimony was around 1977, but treatment records indicate the slip occurred in 1978). Mr. Liberty walked with help to his supervisor's office and was sent to the hospital where x-rays were negative. Mr. Liberty received a shot in his hip at that time and was kept off work for four days. According to Mr. Liberty, his back never got better after the 1977 incident. His employer added some cabling to help with lifting tanks in the spinner room, but the cables were added to all spinner room tanks and not specifically as an accommodation for Mr. Liberty. Mr. Liberty was able to successfully continue his work with OC at this time. He continued to work full-time, even over-time. Except for one visit to the chiropractor in 1983, he did not again seek

treatment for his back until 1987, approximately nine years after 1978. He did not file a workers' compensation claim for the 1978 incident; he was not placed on any permanent work restrictions by a treating physician; he was not assigned any percentage of disability.

On November 3, 1987, Mr. Liberty was operating a cutoff forklift when he hit a pothole at approximately 12:30 a.m. and was unable to move his back. He waited until his supervisor, Dale Franklin, walked past Mr. Liberty's location and Mr. Liberty called out to him for assistance. Mr. Franklin got a driver and sent Mr. Liberty to Shawnee Mission Medical Center where x-rays were negative. Mr. Liberty reports having a CT scan at that time. However, those records are not available and what they showed, if anything, is unknown. Mr. Liberty was treated by Dr. Roderick with manipulations and was released back to work after approximately seven days, including his regularly scheduled days off, with no restrictions on his activities. Mr. Liberty was able to successfully continue his work with OC at this time. He continued to work full-time, even over-time. He did not file a workers' compensation claim; he was not placed on any permanent work restrictions by a treating physician; he was not assigned any percentage of disability.

Mr. Liberty testified that in approximately 1990 grounds maintenance was added to his previous position's responsibilities under the job title of service attendant. In that position, Mr. Liberty in 1993 experienced another back incident when his back locked up while he was pushing some scrap into a dumpster. Mr. Liberty was taken to the hospital and was given two epidural shots. Mr. Liberty resumed working, although he did testify that he occasionally missed work due to his back condition. Mr. Liberty was able to successfully continue his employment with OC at this time and was, according to his own testimony, promoted to service attendant group leader in 1997. He continued to work full-time, even over-time. He did not file a workers' compensation claim for the 1993 incident; he was not placed on any permanent work restrictions by a treating physician; he was not assigned any percentage of disability.

Mr. Liberty testified that in his last position with OC he was required to bend and squat throughout the day, to lift eighty to ninety pounds with assistance, to use air hammers weekly, to use a forklift daily, and to climb ladders three times per week. These activities were expectations of his job until his last day worked on August 22, 1999. He had back surgery the next day on August 23, 1999.

RULINGS

I. VENUE IS NOT PROPER AND MISSOURI DOES NOT HAVE JURISDICTION OVER MR. LIBERTY'S CLAIM.

The Missouri Workers' Compensation Law ("MWCL") states, in pertinent part, that:

This chapter shall apply to all injuries received and occupational diseases contracted in this state, regardless of where the contract of employment was made, and also to all injuries received and occupational diseases contracted outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide, and also to all injuries received and occupational diseases contracted outside of this state where the employee's employment was principally localized in this state. (Emphasis added)

Mo.REV.STAT. § 287.110.2

Our courts deem a contract to have been made where the parties to the contract perform the last act necessary to complete the contract. *Gash v. Black and Veatch*, 976 S.W.2d 31, 32 (Mo. App. 1998). Mr. Liberty claims that the last act necessary to complete his contract of employment was a phone call to him from OC offering him the job in December of 1968. According to Mr. Liberty, he received the call and accepted OC's offer while he was staying at his brother's house in Kansas City, Missouri.

However, this alleged call occurred almost forty years ago, and Mr. Liberty did not provide any corroborative evidence or testimony proving this call actually occurred and that the call was received in Missouri. Mr. Liberty had nine brothers. He lived with several different brothers at various times after leaving the Army; and, although he claims to remember which brother he was staying with at the time, he did get confused on cross-

examination as to where that brother lived. At his deposition, he gave a different general location than he did at the hearing. He did not produce any evidence as to where his brother lived or his brother's phone number. An alleged phone call almost forty years ago is insufficient evidence to uphold the claimant's burden of proof in showing the employer was operating under the MWCL.

Additionally, Mr. Liberty was never officially fired following his original employ with OC in January of 1968. His original hiring was the result of a group interview that took place in Kansas City, Wyandotte County, Kansas. The application was filled-out in Kansas City, Wyandotte County, Kansas. The pre-employment chest x- ray was done in Kansas City, Wyandotte County, Kansas. Mr. Liberty never repeated another x-ray for OC in the hiring process. He reported to work in Kansas City, Wyandotte County, Kansas. And, he alleges that he was injured in Kansas City, Wyandotte County, Kansas.

In demanding lifetime payments from the state of Missouri, Mr. Liberty has the burden of proving that his employer was operating under the MWCL. With doubts regarding Mr. Liberty's employment status with OC while he worked the summer of 1968 in Nebraska and doubts about which of his several brothers he roomed with at the time of the OC call in December of 1968, the gossamer thread of a phone call from almost forty years ago is unconvincing in tethering Mr. Liberty's claim for compensation from the Second Injury Fund.

In *Whiteman v. Del-Jen Construction, Inc.*, 37 S.W.3d 823 (Mo.App. W.D. 2001), the court held that a single phone call received in Missouri, if it was the final act in making a binding contract in Missouri, is adequate in establishing Missouri jurisdiction. However, *Whiteman* is distinguishable from Mr. Liberty's case because in *Whiteman* telephone records, personnel records, and claimant's brother all corroborated claimant's testimony. Also, the call in *Whiteman* was made only three years prior to the hearing - when the witness' memory was still fairly fresh. In Mr. Liberty's case, there were no phone records, personnel records, or testimony admitted into evidence that corroborate Mr. Liberty's testimony. Further, the alleged call occurred almost forty years prior to the hearing date. I find Mr. Liberty's testimony unconvincing and overall that he was not a credible witness. Therefore, something more than just his testimony is needed to establish Missouri jurisdiction.

II. ARTHUR LIBERTY IS NOT ENTITLED TO COMPENSATION FROM THE SECOND INJURY FUND BECAUSE HIS DISABILITY IS NOT THE RESULT OF "COMBINED DISABILITIES".

In order to be entitled to Second Injury Fund benefits under Section 287.220 RSMo, 2005, a claimant must have a permanent, "previous disability." *Leutzinger v. Treasurer of Missouri*, 895 S.W.2d 591 (Mo.App. E.D. 1995). The disability must exist at the time the work-related injury was sustained and be of such seriousness to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo.App. E.D. 1999). Fund liability is triggered only by a finding of the presence of an actual and measurable disability at the time the work injury is sustained. *Id.* at 215. With respect to permanent- total benefits, the Second Injury Fund can only be liable when a "prior injury combines with a later, on the job injury so as to produce permanent and total disability that would not have resulted in the absence of the prior disability or condition." *Weubbling v. West County Drywall*, 898 S.W.2d 615, 616-617 (Mo.App. E.D. 1995).

At the hearing, Mr. Liberty identified three incidents related to his lower back that occurred throughout his employment: one in 1978, one in 1987, and one in 1993. However, none of these incidents produced any objective symptoms of injury or an actual and measurable disability. The medical imaging performed on each of those occasions was negative for any objective conclusions related to an acute injury. According to Dr. Koprivica's report, x-rays taken on November 11, 1978 were negative for injury to the lumbar spine (Ex. B, p. C00003). Dr. William Smith found no evidence of acute injury in an x-ray taken immediately following the November 3, 1987 incident (Ex. J, p. C00121). Electrodiagnostic studies conducted in 1990 were also negative (Ex. B, p. C00004). On July 29, 1993, Dr. Robert MacNaughton's x-ray report showed "very mild degenerative changes in the lower lumbar spine with narrowing of the disc space mild at L5-S1" (Ex. N, p. C00200). Alignment was normal, the pedicles were intact, and no bony destructive lesions were seen. (Ex. N, p. C00200). There was no evidence of impingement of the spinal cord (Ex. A, p. 18-19:24-1).

It wasn't until Dr. Gregory Walker's report of July 29, 1999, some six years after Mr. Liberty's last incident at

work that an actual herniation was found or that surgery was ever discussed. Dr. Walker noted a disk herniation at L5, S1 with effacement at the S1 roots (Ex. K, p. C00137). Dr. Walker stated that he told Mr. Liberty "if we really want to attack [your] low back pain," a posterior fusion surgery would probably be beneficial (Ex. K, p. C00137). At that time, Dr. Walker indicated that Mr. Liberty planned to proceed with the surgery around mid-August of 1999 (Ex. K, p. C00137). Mr. Liberty's last day worked was August 22, 1999. He had surgery the next day on August 23, 1999. It was his first and only back surgery. He was not prescribed a cane until 2000. He was not prescribed a walker until 2004.

Mr. Liberty did not file a workers' compensation claim for any of the three prior incidents; he was not rated for purposes of assigning a percentage of disability; he was not placed on any permanent work restrictions following these three incidents; co-workers did not help him with his job duties; he continued to receive good evaluations from his supervisors, and he was even promoted to a supervisory position himself. He continued to work full-time, even over-time; he continued to actively participate in his hobbies of bowling and softball and even added the sport of volleyball to his repertoire following the 1993 incident. He was able to do routine chores on a frequent basis including cooking, laundry, vacuuming, mowing, trimming, maintenance of his house, and changing the oil in his cars (Ex. E, p. C00026). He also enjoyed visiting with his family members in Nebraska and Arkansas and had a fairly active social life prior to leaving his employment at OC. (Ex. E, p. C00027).

Mr. Liberty continued to experience promotions with his employer. Mr. Liberty received a promotion to group leader in 1997, nearly three years following his 1993 - and final - back incident at work. Mr. Liberty testified that until the very last day of his employ with OC - one day before his scheduled back surgery - his job required bending and squatting throughout the day, lifting eighty to ninety pounds with assistance, using air hammers weekly, using a forklift daily, and climbing ladders three times per week. Mr. Liberty's workplace record of continuing ability to perform his work and continuing to receive promotions and positive job reviews indicates he had no substantial hindrance or obstacle to his successful performance of his job duties.

The Second Injury Fund retained Dr. Swaim, a board certified orthopedic surgeon, to review Mr. Liberty's medical records and to issue an opinion as to causation. He was a practicing orthopedic surgeon between 1983 and 1998. During that time, he saw and treated patients. Other physicians would refer patients to Dr. Swaim for surgery. Dr. Swaim testified at his deposition that he is able to read the results from the diagnostic tests that he orders without the benefit of radiological input. In fact, he performed the same types of surgery that Mr. Liberty underwent in this case. Dr. Swaim concluded that:

[Mr. Liberty's] lumbar condition resulted from cumulative trauma injuries and an associated degenerative process. There is no indication that Mr. Liberty's permanent and total disability is related to separate causal entities. Therefore, the permanent and total disability was substantially caused by the persistent cumulative trauma injuries Mr. Liberty sustained due to his occupation and degenerative process, and not related to a combined enhancement of separate injuries

See, Second Injury Fund Exhibit 4 at 4.

At his deposition, Dr. Swaim testified, "to me this is pretty classic cumulative trauma." See, Second Injury Fund Exhibit 6 at 30:14-15.

The claimant retained Dr. P. Brent Koprivica. Dr. Koprivica is not an orthopedic surgeon and he cannot perform the type of surgery that Mr. Liberty had. He is board certified in occupational medicine. In his first two reports, Dr. Koprivica agrees with Dr. Swaim's conclusions. Dr. Koprivica states in his original report dated August 13, 2002, that Mr. Liberty had chronic low back pain and degenerative disk disease attributable to repetitive injuries to the lumbar spine and that "[h]is long-term employment at OC is felt to be a substantial factor in the development of the progressive degeneration" (Ex. B, p. C00009). Dr. Koprivica attributed Mr. Liberty's permanent and total disability to "his lumbar condition and failed back syndrome in isolation" (Ex. B, p. C00010). Dr. Koprivica reiterated his opinion in a letter dated August 10, 2003 where he stated that his opinions had not materially changed as a result of reviewing vocational specialist Mary Titterington's report (Ex. C, p. C00020).

In fact, the first time Dr. Koprivica opined that it was a combination of pre-existing and current injuries which

caused Mr. Liberty's permanent and total disability was in his report dated August 30, 2004 - over two years after he had seen Mr. Liberty for a single evaluative visit (Ex. D, p. C00022) and contemporaneous with the settlement with the employer. To the extent that the two experts are in disagreement, the Court will defer to the findings and conclusions of Dr. Swaim. As an orthopedic surgeon, Dr. Swaim is more qualified to determine nature and extent of disability and to render opinions as to causation than Dr. Koprivica. The Court finds Dr. Swaim's testimony to be more credible than that of Dr. Koprivica.

Because there was no actual or measurable disability at the time of these three incidents, Mr. Liberty did not have a previous disability. If he did, it certainly did not rise to the level of being a substantial hindrance or obstacle to his employment or reemployment, and, there was no combination to render Mr. Liberty more disabled than he would have been otherwise. Therefore, the Second Injury Fund is not liable for permanent and total benefits.

III. CONCLUSION

The Court finds that Mr. Liberty did not meet his burden of proving a Missouri contract of employment or Missouri jurisdiction. Moreover, there was no "accident" on August 22, 1999 or before that resulted in any disability. Mr. Liberty's injury is due solely to repetitive and cumulative trauma over the course of his thirty year career with OC; therefore, the Second Injury Fund is not liable for permanent and total disability benefits. Therefore, for the reasons stated above, benefits must be denied on this claim.

Date: _____

Made by: _____

R. Carl Mueller, Jr.
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation