

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

Injury No.: 01-053538

Employee: Jackie Lingerfelt
Employer: Elite Logistics
Insurer: Rsko
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: May 19, 2001

Place and County of Accident: Greene County, 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. Pursuant to section 286.090 RSMo, subsequent to reviewing the evidence and considering the entire record, the Commission modifies the award and decision of the administrative law judge dated January 10, 2006.

I. Preliminary Matters

The Commission affirms all findings and conclusions of the administrative law judge, but for the determination of the appropriate rate for temporary total disability. The administrative law judge concluded the proper rate was \$590.17. The Commission modifies that determination, by concluding the proper rate for temporary total disability is \$599.96 per week.

II. Compensation Rate

The employee's last day of work was May 19, 2001. Section 287.250.1(4) RSMo is the applicable statutory provision. It states as follows:

If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured... For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision;

The following information is gleaned from the employee's check stubs concerning the thirteen weeks immediately preceding May 19, 2001:

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|---|---|
| 1. <u>Period Ending May 19, 2001:</u> | 26 regular hours plus 7.13 overtime hours worked = \$1350.45; |
| 2. <u>Period Ending May 12, 2001:</u> | 26 regular hours worked plus 5.72 hours overtime = \$804.04; |
| 3. <u>Period Ending May 5, 2001:</u> | 26 regular hours worked plus 7.25 hours overtime = \$850.67; |
| 4. <u>Period Ending April 28, 2001:</u> | 26 regular hours worked plus 7.77 hours overtime = \$1155.83; |
| 5. <u>Period Ending April 21, 2001:</u> | 24 regular hours worked plus 7.53 hours overtime = \$954.24; |
| 6. <u>Period Ending April 14, 2001:</u> | 32.65 regular hours worked = \$1009.56; |
| 7. <u>Period Ending April 7, 2001:</u> | 45 regular hours worked = \$1222.45; |

8. Period Ending March 31, 2001: 10 regular hours worked = \$730.33;
9. Period Ending March 24, 2001: 21.5 regular hours worked = \$833.45;
10. Period Ending March 17, 2001: 10.5 regular hours worked = \$602.48;
11. Period Ending March 10, 2001: 11.5 regular hours worked = \$736.28;
12. Period Ending March 3, 2001: 10 regular hours worked = \$1120.72;
13. Period Ending February 24, 2001: this period should not be used as Employee commenced work on a day other than the beginning of a calendar week

The week and wages earned during the week ending in February 24, 2001, should be excluded in computing the average weekly wage as the employee commenced employment on a day other than the beginning of a calendar week. Pursuant to section 287.250.1(4), the employee's wages for the thirteen-week period must now be divided by twelve, in lieu of thirteen.

The total wages for the thirteen-week time frame is \$11,370.50. Dividing this by twelve gives an average weekly wage of \$947.54 and a resulting compensation rate (maximum benefit amount) of \$599.96 for permanent total/temporary total disability benefits and \$314.26 for permanent partial disability benefits. Therefore, the Commission finds the applicable compensation rate to be \$599.96/\$314.26.

Based on the above modification, the Commission ascertains and determines employee's compensation rate for temporary total disability benefits is \$599.96. Consequently, the amount of compensation payable is modified to the following amount: underpayment of temporary total disability of \$1,317.57 [(\$599.96 – 564.35) x 37 weeks].

The award and decision of Administrative Law Judge Margaret Ellis Holden, issued January 10, 2006, as modified is attached and incorporated by 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 12th day of April 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Jackie Lingerfelt Injury No. 01-053538

Dependents: N/A

Employer: Elite Logistics

Additional Party: Second Injury Fund

Insurer: Rsko

Hearing Date: 7/20/04 & 12/16/05 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: 5/19/01
5. State location where accident occurred or occupational disease was contracted: Greene County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
YES
7. Did employer receive proper notice? YES
8. Did accident or occupational disease arise out of and in the course of the employment?
YES
9. Was claim for compensation filed within time required by Law? YES
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
CLAIMANT WAS DRIVING A HOSTLER VEHICLE WHEN HE HIT A POTHOLE CAUSING HIM TO STRIKE
HIS HEAD ON THE ROOF OF THE VEHICLE.
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: 20%
15. Compensation paid to-date for temporary disability: \$20,880.95
16. Value necessary medical aid paid to date by employer/insurer? \$44,480.04

Employee: JACKIE LINGERFELT Injury No. 01-053538

17. Value necessary medical aid not furnished by employer/insurer? NONE

18. Employee's average weekly wages: N/A

19. Weekly compensation rate: \$590.17/\$314.26

20. Method wages computation: ACCORDING TO LAW

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$0

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

80 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

UNDERPAYMENT OF TTD \$25.82 PER WEEK FOR 37 WEEKS TOTALING \$955.34

Permanent total disability benefits from Employer beginning n/a, 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

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

TOTAL: SEE AWARD

23. Future requirements awarded: NONE

Said payments to begin immediately and to be payable and be subject to modification and review as provided by
law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments
hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

PAUL REICHERT

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jackie Lingerfelt Injury No. 01-053538

Dependents: N/A

Employer: Elite Logistics

Additional Party: Second Injury Fund

Insurer: Rsko

Hearing Date: 7/20/04 & 12/16/05 Checked by: MEH

On July 20, 2004, and December 16, 2005, the parties appeared before the undersigned administrative law judge for a final hearing. The employer appeared represented by Jerry Harmison and the claimant appeared in person represented by Paul Reichert. The Second Injury Fund appeared represented by Susan Colburn.

The parties stipulated that on or about May 19, 2001, Elite Logistics was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Rsko. On the alleged injury date of May 19, 2001, Jackie Lingerfelt was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. The parties agree that on or about May 19, 2001, the claimant sustained an accident which arose out of the course and scope of employment. This employment occurred in Greene County, Missouri. The claimant notified the employer of his injury as required by Section 287.420. The claimant's claim was filed within the time prescribed by Section 287.430. Temporary total disability benefits have been paid in the amount of \$20,880.95, which represents 37 weeks at the rate of \$564.35 between the dates of June 10, 2001, to March 2, 2002. The employer has paid medical benefits in the amount of \$44,480.04. The attorney fee sought is 25%.

ISSUES:

1. Whether the accident caused the injuries and disabilities for which benefits are now being claimed.
2. Whether the employer is obligated to pay for past medical expenses, including the medical lien.
3. 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.
4. What is the proper rate (ruled \$590.17).
5. Any temporary total disability benefits owed to the claimant for past underpayment through March 4, 2003.
6. The nature and extent of any permanent disabilities from employer including permanent total disability from March 5, 2003.
11. The liability of the Second Injury Fund.

FINDINGS OF FACT:

The claimant worked as a truck driver. Prior to this he had been a silkscreen operator at Litton Industries, a

dump truck driver, and then a truck driver.

On May 19, 2001, the date of the injury, he was operating a "hostler buggy", which is a one-person vehicle used to move trailers inside the yard. He was taking trailers from the dock to the back lot. It had been raining earlier in the day. There was a hole in the pavement that he did not see because of water on the pavement. He hit this hole which caused him to bounce up in his seat and strike his head on the roof of the vehicle.

He was at first dazed. He reported the incident to his supervisor. He finished work that day. He experienced increased pain and worked until June 9, 2001, when he reported to the dispatcher that he could not work because of the pain in his neck.

The employer sent him to Dr. Jeffrey Woodward. Claimant was having pain in his neck, between the shoulder blades, in his shoulders, his fingers tingled, and his arm hurt. His left leg has started hurting and his hip and thigh were numb. He was referred to Dr. Ceola who recommended surgery. He was sent to Dr. Reintjes in Kansas City for a second opinion. He also recommended surgery.

An EMG performed on October 1, 2001, showed mild denervation in the C7-8 distribution, suggestive of a mild or early right C7-8 cervical radiculopathy. A cervical myelogram performed October 8, 2001, showed osseous ridging causing some mild spinal stenosis at C5-6 and C6-7. A CT scan that same day showed very mild spinal stenosis at C6-7 with flattening of the cervical cord and narrowing of the anterior subarachnoid space causing associated cord deformity at C5-6. The claimant had a history of atrial fibrillation and hepatitis C. After being cleared for surgery by his internal medicine physician, Dr. Ceola performed a cervical discectomy and arthrodesis at C5-6 and C6-7, bone grafting and plating from C5 to C7 on November 9, 2001.

Postoperatively, claimant's arm pain was completely resolved, although he did have severe spasms in his neck. He was treated for these with muscle relaxers. Upon discharge he was ambulatory and his pain was controlled with oral medication.

Claimant's wife and daughter testified that after the surgery, the claimant acted differently. They said he was mean, made no sense and did not seem to know what was going on. Claimant's wife said that the claimant had trouble walking and would stagger. On November 14, 2001, the claimant went to the emergency room with a fever. The claimant's wife reported that he was hard to wake up and was hallucinating. A CT scan of the head was performed, which was negative. The emergency room records report that the claimant acted appropriately when he was there. A lumbar puncture was attempted to rule out meningitis. The claimant decided he did not want to complete the procedure and left the emergency room against medical advice.

On December 3, 2001, Dr. Keith Ellis examined the claimant. The claimant reported slurred speech, broken aphasia and very poor coordination. He was walking with a cane. He was also complaining of severe burning from the left hip to the knee. Dr. Ellis did not see any obvious anatomical locations for a stroke or other cause which would explain his symptoms. He ordered an MRI and treated the claimant with Neurontin. The MRI showed

post surgical anterior fusion and C5-6-7.

In a follow-up visit with Dr. Ceola on December 11, 2001, the claimant reported the stroke like symptoms. Dr. Ceola noted that on examination the claimant had no neck or arm pain. He did report the claimant had slurred speech and difficulty with tongue function. He had numbness in the lower extremities, left more than right. Dr. Ceola ordered an MRI. It showed a broad-based disc bulge at L3-4, with mild, multi-level lumbar degenerative disc disease and facet degenerative changes without central canal or neural foraminal stenosis. Dr. Ceola continued to keep him off work until his stroke symptoms resolved.

Dr. G.F. Wong examined the claimant on January 18, 2002. He reviewed the MRI's, which he thought indicated some small vessel disease which he felt could be the basis for his symptoms. An echocardiogram performed on January 24, 2002, showed normal functioning.

On February 21, 2002, the claimant returned to Dr. Ceola. He complained of increasing problems with his low back and could only stand for short periods of time without having severe debilitating pain in his back. After discussing different options, the claimant decided to proceed with surgical intervention on his back.

Prior to this surgery, Dr. Ceola referred him to Dr. Roy Schwartz for a cardiology consultation. A transesophageal echocardiogram was performed on March 1, 2002. It showed the presence of a patent foramen ovale.

On March 4, 2002, Dr. Ceola performed a posterolateral arthrodesis at L3 to L4, an L3-4 posterior lumbar interbody fusion, nerve root decompression with foraminotomy and facetectomy with bone grafting and hardware. His discharge summary showed that the claimant did well postoperatively with one episode of mild confusion, which was felt to be related to medication. He was ambulatory without difficulty and had no leg pain. On April 2, 2002, he returned to Dr Ceola, whose records show that the claimant was doing well and that the pain in his back was almost completely resolved.

Dr. Ceola continued to treat him in follow-up. On July 24, 2002, Dr. Woodward re-examined him. He found that the claimant was at maximum medical improvement for the cervical condition and released him to full-time regular work for the cervical condition. He also issued a final rating of 15% of the body as a whole for the cervical condition.

On September 4, 2002, Dr. Ceola wrote a letter in which he stated that with a reasonable degree of medical certainty, the cervical spine injury was directly related to the work injury. He felt the lower back problem was an unrelated problem and a pre-existing condition. He noted that the claimant had made a statement in his history that he had pre-existing back pain.

Dr. Ellis continued to treat the claimant for his back pain with medication and indicated that physical therapy might be necessary. On October 17, 2002, Dr. Ceola found him at maximum medical improvement and released him from his care.

On November 1, 2002, the claimant called Dr. Wong reporting several episodes of seizures. Dr. Wong ordered an EEG, which showed activity that did not correspond to any particular seizure-like activity clinically. He suggested some tendency for generalized epilepsy. On November 6, 2002, the claimant returned to Dr. Schwartz complaining of palpitations approximately once a week lasting for 5 seconds and muscle jerks that cause him to fall down and not be able to control himself. He was also complaining of back pain. Dr. Wong saw him on November 20, 2002, and assessed syncope and collapse, epilepsy nec without intractable epilepsy. Dr. Wong treated him with Depakote. The claimant had problems taking Depakote and was experiencing dizziness and muscle spasms. Dr. Wong reviewed an MRI and did not feel the claimant has MS.

Dr. Janie Vale examined the claimant on February 18, 2003. She was provided medical records to review, but they did not include the records of Dr. Wong or Dr. Schwartz. The claimant gave her a history of he suffered a stroke shortly after his surgery on his left side. He also told her he had a second stroke around Thanksgiving 2002. He also told her that the cervical surgery resolved his left arm pain. He told her that the strokes had left him mentally cloudy. Dr. Vale concluded that the claimant had had an excellent outcome from the cervical surgery. She rated him at 20% of the body for the cervical condition, with 7% of this related to pre-existing conditions. She also concluded that the claimant's back condition was sustained during the injury itself.

On March 6, 2003, the claimant saw Dr. Schwartz and complained of an episode in which he had slurred speech, confusion, and fell. He denied chest pain but did report occasional palpitations. Dr. Schwartz stated that given the history of atrial fibrillation and patent foramen ovale, he would best be managed with Coumadin for recurrent stroke prevention. He continued to have episodes of falling and saw both Dr. Schwartz and Dr. Wong.

Dr. Norbert Belz examined the claimant on June 18, 2003. He was furnished medical records, but they did not include Dr. Schwartz's records. Dr. Belz concluded that the claimant had sustained a stroke during the cervical surgery. He concluded that this was an occupational stroke which caused multiple falls resulting in the claimant's back condition. He found the back surgery of March 4, 2002, work-related. Dr. Belz concluded that the claimant is permanently and totally disabled as a result of the cervical condition, the low back condition, and the strokes.

In July 2003, after Dr. Wong increased the claimant's Phenobarb, he experienced a rash, seeing things and suicidal thoughts. He was admitted to the psychiatric ward, and these symptoms improved after his dosage was decreased. On July 14, 2002, Dr Wong noted that his epilepsy condition was deteriorated. The claimant had a history of depression and was treated by his private psychologist, Dr. James Bright. Dr. Wong found that the claimant's mood disorder was long standing and that Dr. Bright had seen him for 15 years. He did not believe that this was precipitated by the Phenobarbital, but because of the concern that it could have exacerbated things, he changed his medications.

On November 15, 2003, Dr. Schwartz stated that the claimant's primary problem might be episodes of orthostatic hypotension and felt that his medications could be contributing to this problem. He also stated that the

claimant had significant emotional problems which he felt could be contributing significantly to his conditions. He recommended to the claimant and his wife that they consider psychotherapy. He referred claimant for a second opinion, a pain specialist. The claimant did not see the pain specialist.

On June 15, 2004, Dr. Wong stated in a letter that in his opinion, the cervical spine injury was work-related. He further stated that "the subsequent symptoms relate to small blood vessels, cerebral infarctions, which are strokes related to multiple small clots from his heart; the underlying risk of heart clots being his paroxysmal atrial fibrillation or irregular heart rate and the 'hole' in his heart known as the patent foramen ovale." He further stated that, "it is with reasonable certainty, based on the above evaluation that the patient's events that have persisted long after his on-the-job accident of 5/19/01 and cervical surgery by Dr. Ceola, are not related to either of these but rather caused by multiple strokes from his heart problems. The 'hole' in his heart has most likely been present since birth. Furthermore, the nature of these cerebral infarctions or strokes, being small vessel in character, are uncharacteristic for a stroke that might be seen after cervical surgery."

The claimant's wife testified that before the work injury, the claimant was in good health and could do anything around the house. She testified that presently the claimant sleeps a lot, watches television and does no outside activity. He still sees a lot of doctors. He forgets things such as his medication. The claimant testified that he has neck and back pain. He drives himself. On an average day, he will sit a lot and watch television. On bad days he may not be able to get up for 2-3 days.

After the first hearing date of July 20, 2004, the parties attempted to resolve the case but could not do so. Subsequent treatment records admitted at the hearing in December 2005 show that the claimant has continued to treat with Dr. Bright. He has also had a knee replacement surgery. His back pain has increased, and he has treated at the pain clinic at Doctors Hospital of Springfield for post laminectomy syndrome. He has had an intrathecal pump implanted to relieve his back pain. He has also had epidural injections and facet blocks at L5-S1. Dr. Mark Bult has treated him for failed back syndrome and lumbar radiculitis with chronic opioid therapy. He has been taking OxyContin.

Wage records were discussed at the time of the hearing, and I ruled that the appropriate wage rate is \$590.17.

Wilbur Swearingin, a certified vocational rehabilitation counselor, evaluated the claimant's ability to work. He found that the claimant had vocationally disabling conditions which included a long history of depression and anxiety; chronic hepatitis C; paroxysmal atrial fibrillation; upper extremity pain and chondromalacia of both knees prior to the work injury of May 19, 2001. He further found that due to the claimant's medical background, age, history as a truck driver, limited education, and use of narcotic pain medications, the claimant is neither employable nor placeable in the open labor market. He found that he is totally and permanently disabled and that this is due to the March 19, 2001, injury standing alone.

CONCLUSIONS OF LAW:

1. Whether the accident caused the injuries and disabilities for which benefits are now being claimed.

After carefully considering all of the evidence, I find that the only condition of the claimant which was caused by the work-related injury is his cervical condition. In reaching this conclusion, I relied primarily on the opinions of Dr. Ceola, Dr. Schwartz and Dr. Wong. I find their opinions the most credible and, therefore, give them substantially greater weight than the other opinions. This is because they are treating physicians and have the most knowledge of the claimant's injury and course of treatment. They are also specialists that have treated him for specific conditions and have, therefore, a broader foundation for reaching their opinions. As a result of this ruling, I find all the other conditions for which claimant is seeking compensation, including the back condition and the stroke symptoms, to not be work-related.

2. Whether the employer is obligated to pay for past medical expenses, including the medical lien.

I do not find that there are any unpaid medical expenses due as a result of the compensable injury.

3. 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 do not find that the claimant will require any future medical treatment as a result of the compensable cervical injury. All future medical treatment is the result of non-compensable injuries.

4. What is the proper rate.

I previously ruled at the time of the hearing that the correct rate is \$590.17 as a result of discussions with the parties.

5. Any temporary total disability benefits owed to the claimant for past underpayment through March 4, 2003.

I do not find that the claimant was temporarily and totally disabled past March 4, 2003. The claimant was under paid temporary total disability for 37 weeks at the rate of \$564.35. Therefore, I find that the claimant is entitled to an additional \$25.82 per week for the 37 weeks he was temporarily and totally disabled, totaling \$955.34 due as a result of this underpayment.

6. The nature and extent of any permanent disabilities from employer, including permanent total disability from March 5, 2003.

I find that the claimant has sustained a permanent partial disability of 20% of the body as a whole as a result of his cervical injury resulting in a cervical fusion.

7. The liability of the Second Injury Fund.

Claimant and his wife testified that he was in good health prior to the date of the injury and that his pre-existing conditions of back pain, depression, hepatitis, and his heart condition were not symptomatic and/or did not interfere with his ability to work. Therefore, I find that he did not have any pre-existing disability to reach the thresholds of 12.5% of the body or 15% of an extremity to trigger enhanced permanent partial disability.

Furthermore, although claimant has been found permanently and totally disabled by Dr. Belz and Wilbur Swearingin, this is the result of conditions that have come into existence or worsened subsequent to the work-related injury of May 19, 2001, and therefore are not relevant to Second Injury Fund liability for permanent total disability. I therefore find that the Second Injury Fund is not liable for any benefits in this case.

Claimant's attorney, Paul Reichert, 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.

Date: January 10, 2006

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

A true copy: Attest:

/s/ Patricia "Pat" Secret
Patricia "Pat" Secret
Director
Division of Workers' Compensation