

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

Injury No.: 04-147451

Employee: Virgil Mawby
Employer: Liberty Carbon Service (Settled)
Insurer: Travelers Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 21, 2010. The award and decision of Administrative Law Judge Emily Fowler, issued December 21, 2010, 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 30th day of June 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Virgil Mawby

Injury No. 04-147451

Dependents: N/A

Employers: Liberty Carbon Service

Insurers: Travelers Insurance Company

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

Hearing Date: November 29, 2010

Checked by: EF/cy

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: May 11, 2004
5. State location where accident occurred or occupational disease was contracted: Excelsior Springs, Clay County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did accident or occupational disease arise out of and in the course of the employment? Yes.
8. Was claim for compensation filed within time required by Law? Yes.
9. Was employer insured by above insurer? Yes.
10. Describe work employee was doing and how accident occurred or occupational disease contracted: While in the course and scope of his employment, Employee was on top of a tank coming down a ladder when he missed a step, tried to grab the railing and fell, landing on his back, hitting his head on a metal floor.
11. Did accident or occupational disease cause death? No. Date of death? N/A
12. Part(s) of body injured by accident or occupational disease: Body as a whole related to his back, head, arms, and right leg.
13. Nature and extent of any permanent disability: 12.5% permanent partial disability related to the low back and groin.

14. Compensation paid to-date for temporary disability: \$0
15. Value necessary medical aid paid to date by employer/insurer? \$0
16. Value necessary medical aid not furnished by employer/insurer? None
17. Employee's average weekly wages: \$502.00
18. Weekly compensation rate: Maximum \$334.67/\$334.67
19. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: Previously settled with the employer for 12.5% permanent partial disability to the body as a whole equating to 50 weeks at \$334.67 for \$16,733.50.
22. Second Injury Fund liability: Permanent total disability benefits from the Second Injury Fund beginning May 11, 2004 at \$334.670 per week with a credit of 334.67 per week for 50 weeks, and thereafter, \$334.67 per week for the remainder of employee's life.
23. Future requirements awarded: None

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of Frank Eppright, attorney, for necessary legal services rendered pursuant to Missouri Statute §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Virgil Mawby

Injury No. 04-147451

Dependents: N/A

Employers: Liberty Carbon Service

Insurers: Travelers Insurance Company

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

Hearing Date: November 29, 2010

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On November 29, 2010, the parties appeared for hearing. The employee, Virgil Mawby, appeared in person and with counsel, Frank Eppright. The employer and its insurer previously settled their liability with their employee. The Second Injury Fund appeared by Assistant Attorney General Kim Fournier. The Division had jurisdiction to hear this case pursuant to §287.110.

STIPULATIONS

At the hearing the parties entered into the following stipulations:

- 1) that on or about May 11, 2004, employer and employee were operating under and subject to the Missouri Workers' Compensation Law and the employer was fully insured through Travelers Insurance;
- 2) that Virgil Mawby was an employee of Liberty Carbon Services;
- 3) that the employee filed his claim allowed by law;
- 4) that employee's average weekly wage was \$502.00, making a compensation rate of \$334.67 for temporary total and permanent partial disability benefits;
- 5) that no money was paid for temporary total disability compensation by the employer, nor was there any medical aid furnished by the employer;
- 6) that employer's liability was previously settled for 12.5% permanent partial disability to the body as a whole referable to the back.

ISSUES

The issues to be determined by the Court are as follows:

- 1) whether employee sustained an accident or occupational disease arising out of and in the course of his employment;
- 2) whether the employee notified the employer of the injury as required by law;

- 3) whether the employee suffered any previous disability, as well as disability from the most recent injury and if so, the nature and extent of such disabilities;
- 4) whether the Second Injury Fund is liable to the employee for any disability compensation.

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

- A) 6/25/10 Deposition of P. Brent Koprivica w/ Exhibits
- B) 5/4/10 Deposition of Allan D. Schmidt w/ Exhibits
- C) 6/8/10 Deposition of Mary W. Titterington w/ Exhibits
- D) Educational Records of Kansas City School District
- E) Educational Records of Excelsior Springs High School
- F) 03-098427 Stipulation of Compromise Settlement
- G) 04-147451 Stipulation of Compromise Settlement
- H) Claimant Complaints

The Second Injury Fund presented no live testimony, but offered the following exhibit, which was admitted into evidence without objection:

- 1) 11/13/09 Deposition of Virgil Mawby

Based on the above exhibits and the testimony of the witness, this Court makes the following findings: Virgil Mawby, hereinafter referred to as employee, is a 63-year-old man who worked for Liberty Carbon Service for five years prior to his injury of May 11, 2004. His job duties included monitoring unit operation, as well as heating and cooking the carbon. He monitored gauges to ensure correct temperature; he would add coolants depending on the reading of the temperatures and would load and unload trucks with carbon. His duties required him to climb stairs to add buckets of chemicals to the machines. He would also do some clean up and sweeping. This was a medium to heavy type job. He also operated a forklift and did some painting. On May 11, 2004, he was on top of a tank dumping some carbon into the tank. When he climbed down from the ladder, he missed a step. He tried to grab the railing but missed it and fell, landing on a metal floor, hitting his head, arm, and his back and twisting his right leg. He also injured his right testicle.

The employee was seen and treated by Dr. Buzard for quite some time for back and leg pain and eventually had surgery to remove his right testicle. Initially employee had an increase of his back pain from what had preexisted this 2004 injury, which included radiation of pain further down the left leg and all the way to the ankle. Initially employee thought the pain in the right groin area was a hernia because of the swelling. He was treated quite some time by Dr. Buzard as well as Dr. Moore for what was diagnosed as epididymo-orchitis. Eventually Dr. Buzard also started treating him for increased low back pain. This treatment did not begin until sometime in October 11, 2004, although employee states that he complained of his back problems ever since the accident. He was eventually referred to a Dr. Landers at the headache and pain center in Excelsior Springs Medical Center in November 2004 for pain management in terms of the low back pain. An MRI scan was done on December 3, 2004, showing diffuse spondylosis with a small central protrusion at L4-L5 associated with annular tear. This was a

level that had been previously noted to have an annular tear and some bulging back in 2000. The MRI results showed there were degenerative changes and flattening in the disk at L1-L2, L2-L3, and L4-L5. Eventually Dr. Moore performed a right scrotal orchiectomy to try to clear employee's infection in the right scrotal area. This was done on January 26, 2005. Following that surgery, employee began treating with the Veteran's Administration System. His pain management and care was directed by a Dr. Mikeladz at the Veteran's Administration Hospital, who felt that employee was suffering from prostatitis and chronic back pain. Epidural steroid injections were ordered on April 25, 2005 and eventually employee was diagnosed with osteoporosis on a bone density test on May 5, 2005. He was given Fosimax, calcium and vitamin D. It is also noted that employee has been placed on morphine through the pain clinic, which he continues to take to this day.

Employee stated that after the right groin surgery, the swelling and some of the pain had dissipated. He still gets intermittent right groin pain with stairs and climbing ladders, which he did not have previously. He still has increased levels of low back pain and is now having to take morphine for the increased low back pain complaints, and he also suffers a secondary problem of constipation from the use of the medication. Both his groin pain and low back pain interrupt his sleep and he also has greater pain down the left leg that radiates from his back, which also impacts his ability to sleep.

It appears from the medical records that employee's prior medical history included a hospitalization for a work-related occupational exposure in approximately March of 1986 for carbon monoxide poisoning while driving over the road. He also has a 25% permanent partial disability of the left middle finger for prior work-related injury in 1993 and a 5% permanent partial disability to the body as a whole for the low back from an injury of October 13, 2003.

Prior to this injury, employee suffered a serious vehicular accident in 1980. Employee was riding a motorcycle when a pickup truck crossed over the center line and struck employee head on. He was hospitalized at North Kansas City Hospital for the injury. Ultimately it was determined he had a head injury with multiple skull fractures, right frontal and temporal fracture with associated cerebral edema and documented contusion and mild left hemi paresis. There was a basilar skull fracture with spinal otorrhea and also facial lacerations involving the right cheek and right upper eyelid. He suffered from traumatic head and facial injuries along with traumatic brain injury also associated with multiple skull fractures. He had numerous reconstructive surgeries in 1980 and 1981. There is also some evidence of traumatic injury in the lumbar region which showed osteophyte formation but no acute fractures. The same was found in the thoracic and pelvic area. As a residual of this injury, employee was out of work for approximately three years. Employee states he has memory problems due to the traumatic brain injury. According to the numerous medical reports and records it appears that employee had difficulty giving information about his medical history due to his brain injuries and psychological traumas. There are also some additional behavior issues related to the traumatic brain injury as noted in Dr. Schmidt's report.

Additionally, employee suffered an injury July 4, 1993 while working at Electro Wire Products when he had an injury to his left hand in a machine. He suffered a partial amputation of the distal phalanx of the left middle finger. He ultimately received a 25% permanent partial disability to the left middle finger due to this accident.

Also prior to the most recent injury, employee suffered a low back injury in 2000 while working for Liberty Carbon Service. He was unloading a truck using a pallet jack and was pulling on the loaded pallet jack. He slipped on ice, landing on his tailbone and back. Again, Dr. Buzard was the company physician who felt that at the time he was having back pain with suggestion of radiculopathy. X-rays taken of the pelvic area were negative for fracture. An X-ray of the lumbar spine revealed a wedge deformity at L2, but the age was undetermined. He was seen for follow up for a few months and Dr. Buzard ultimately suggested employee could do light-duty work, but that was not available. An MRI scan was done on the lumbar spine in February of 2000 revealing a diffuse lumbar spondylosis. There were small bulges at L1-L2 and L3-L4 and a small annular tear and bulging at L4-L5. Dr. Buzard recommended a 70 pound weight limitation in terms of lifting and carrying based upon his lumbar condition. Employee stated that he was told that he was supposed to work with a helper after that, but in reality the helper was never provided. Although he was hindered in his ongoing work because of back pain, he was able to continue working. Due to this injury, he was on pain medication for a short period of time, but once it was no longer provided by workers' compensation, he could not afford the co pay and the medication stopped.

Employee also had a work-related injury of August or September 2003 when he was lifting an I-beam that was being placed into position so it could be welded. He was on a ladder and a coworker was holding the other end of the I-beam. The coworker dropped his end which caused employee to be knocked from the ladder. He fell about 3 to 3 ½ feet sustaining aggravating injury to his low back. He was not referred for care for this and never received care due to this accident. Employee noted that this injury also increased his back pain.

Finally, employee had another injury in October 2003 when he was on a ladder with a safety case when he slipped and fell about 5 ½ to 6 feet. When he tried to reach and grab, he injured multiple body parts, including his low back. He was seen at Excelsior Springs Medical Center for this injury on October 13, 2003. He was diagnosed as having multiple contusions and abrasions. There was a question as to whether he had some arthritic changes to the left shoulder versus a bulging fracture from the superior glenoid and there was also some acromioclavicular hypertrophy of the left shoulder. X-rays of the right wrist and left elbow and skull were negative for acute bony abnormalities. Employee had no additional care or treatment, but did have aggravation, including persistent pain going down his left leg into the calf level.

Employee also suffered from preexisting psychological problems. Employee testified that he had problems ever since he was in Vietnam in the late 60's early 70's. He was wounded approximately three times. In one incident, a grenade exploded near him causing shrapnel injury to him. Ever since Vietnam, he has had difficulty interacting with other people. Employee was seen by Dr. Allan Schmidt, PhD, who concluded that employee did suffer significant preexisting psychological problems. He noted that employee had a history of abuse as a child being raised by an alcoholic stepfather. He dropped out of school in the 9th grade and entered the Marine Corp. and served in Vietnam and as a result, experienced post-traumatic stress disorder which had been untreated. Further, he found that employee suffered significant head injury in 1990 and that through all of this, he has become increasingly isolated and interactions with others in the past were often problematic, including fighting. Employee's physical limitations were a substantial and predominant factor in the aggravation of his preexisting psychological condition.

As a result of his last injury, his pain and his inability to work, according to Dr. Schmidt, employee has become even more isolated and withdrawn.

Employee's social withdrawal prior to his most recent injuries was his way of dealing with the anxiety associated with his post-traumatic stress disorder. His adjustment to his PTSD is considered to be unstable. Due to employee's anxiety he can only tolerate social interaction in very limited and predictable amounts. He is fearful of experiencing recurring PTSD symptoms and, thus, goes to great effort to avoid situations, discussions, and interaction that he suspects might precipitate their resumption. Dr. Schmidt believed that employee should be referred for psychiatric consultation to determine if medication would be beneficial and also referred for counseling to assist him in developing a more adaptive method for dealing with his social isolation and unresolved PTSD. It would be expected he would need counseling weekly for approximately 12 months and psychiatric consultation monthly for the same time. Dr. Schmidt believed that employee would be unable to successfully return to a workforce and obtain full-time employment in a competitive job market based on the current psychological condition. He ultimately felt that employee suffered a psychological disability rating of 30% with a psychological disability of 25% prior to his injury and 5% psychological disability rating as a result of his last accident.

Employee was also seen by Mary Titterington, a vocational expert, who testified via deposition and also submitted a report. After reviewing employee's work history and performing different testing, including a wide range intelligence test, a wide range achievement test and adult basic learning exam, Ms. Titterington determined that employee, who was a 61-year-old man at the time she saw him, has had lifelong difficulty with job location due to his PTSD and his traumatic brain injury. In more recent years he was able to find a job with Liberty Carbon Service and worked there for five years. His injury results in physical limitations when combined with his low intellectual and emotional functioning level which precluded him from performing any work in the open labor market. She determined that he is unemployable, stating, "There is no expectation that any employer in the usual course of business would be willing to hire him. He routinely takes morphine for pain and attempts to avoid long-term contact with people." She ultimately determined that he is unemployable in the open labor market.

Employee was also seen by Dr. Koprivica who submitted an initial report and an addendum after having reviewed Mary Titterington and Dr. Schmidt's report. He states that noting Ms. Titterington's vocational input, it is his opinion that the permanent total disability as indicated by Ms. Titterington vocationally arises from the impact of combining the preexistent disabilities that have been identified, with the additional disability attributable to the May 11, 2004 work injury claim. He also felt that Dr. Schmidt's report was consistent with his belief of significant preexisting psychological disability as well as the contribution of current psychological factors. He felt that employee was not permanently totally disabled based upon the May 11, 2004 injury considered in isolation, but felt that it was a combination of his preexistent disabilities, which have been identified with the additional disability attributable to the May 11, 2004 work injury claim.

The first issue to be determined by this Court is whether the employee sustained an accident or occupational disease arising out of and in the course of his employment. Employee testified that he was on top of a tank dumping carbon into the tank and was then coming down a

ladder when he missed the step. When he tried to grab the railing, he missed it and fell, landing on a metal floor causing injury to his arm, his head, his back, twisting his back, and also landing hard on his right testicle on a ladder rung. Employee's testimony is found to be credible as it was consistent throughout his testimony before the Court, as well as in his deposition and the medical reports submitted. Although there are some minor discrepancies, it is clear his overall testimony is credible, considering his preexisting problems with a head injury and inability to remember, he did a sufficient job with regard to relating the occurrence of this accident, how it happened, and his subsequent physical problems there from. There being no other testimony contradicting employee's testimony of how this accident occurred and this Court believing the employee's testimony as it stands, this Court does in fact find that employee did suffer an accident arising out of and in the course of his employment.

The next issue to be determined by this Court is whether the employee notified the employer of his injury as required by law. Employee stated that he did in fact tell his employer and was ultimately given authorized medical treatment from the employer. There was no other testimony or evidence showing that he did not notify his employer and therefore, this Court finds that the uncontradicted testimony of employee is believable and employee did in fact notify his employer as required by law.

The next issue to be determined by this Court is whether employee suffered any disability from the last accident, as well as any preexisting disability and if so, the nature and extent of such disability. There is testimony from Dr. Koprivica and a report by Dr. Koprivica of the disability employee suffered from this last accident. Dr. Koprivica felt employee suffered a 20% permanent partial disability to the body as a whole based on his May 11, 2004 injury. Ultimately this matter was settled between the employer and employee for 12.5% permanent partial disability to the body as a whole. Employee testified that he had continuing back pain, including a need for morphine for pain treatment. Also, he had significant left leg radiculopathy and at one point used a cane for ambulation, and also suffered from right testicular pain which ultimately caused the right testicle to be removed. Although that did take away some pain and the swelling, he still suffers pain in the right groin area. This Court, finding no other contradictory evidence finds employee did suffer 12.5% permanent partial disability to the body as a whole due to his last accident. Employee also suffered from preexisting physical and mental conditions. Dr. Koprivica found that employee, due to his multilevel degenerative disk disease and lumbar spondylosis suffered a 15% permanent partial disability to the body as a whole predating the May 11, 2004 injury. He also found that there was a crush injury to the left middle finger with distal amputation of 25% permanent partial disability to the left middle finger predating his work injury of May 11, 2004. There is also testimony from Dr. Schmidt that employee suffered a 25% permanent partial disability to the body as a whole due to psychological conditions which preexisted his last accident, as well as an additional 5% permanent partial disability to the body as a whole due to the enhancement of his psychological condition after the last accident. Therefore, this Court finds that employee did in fact suffer disability due to his last accident, as well as preexisting injuries.

The last issue to be determined by the Court is whether the Second Injury Fund is liable to the employee for any disability. In this case, the employee has alleged that he is permanently and totally disabled. An employer is liable for permanent total disability compensation under §287.220 RSMo 1994 when it is found that the primary accident alone caused the employee to be

permanently and totally disabled. The Mathia v. Contract Freighters Inc., 929 S.W. 2nd, 271, 276 (Mo.App. 1996); Feldman v. Sterling Properties, 910 S.W. 2d 808 (Mo.App. 1995); Moorehead v. Lismark Distributing Company, 884 S.W. 2d 418, 419 (Mo. App. 1994); Kern v. General Installation, 740 S.W. 2nd, 691, 692 (Mo. App. 1987). Compensation cases in which there has been a previous disability are to be determined under §287.222.1 RSMo 1994. In permanent total disability cases, the employer is liable only for the disability resulting from the last injury considered alone and of itself. If this disability is enough in and of itself to render the employee permanently and totally disabled the employer is liable for all such disability. Based upon a review of the medical records, including the opinions of the medical expert and employee's testimony, employee was not rendered permanently and totally disabled due to his last accident alone. The employee settled his claim with the employer for 12.5 percent permanent partial disability to the body as a whole relating to his back. Dr. Koprivica determined that employee did not suffer a permanent total disability due to the last accident alone. This Court finds this determination is reasonable.

Since this Court has determined that the employee's last accident resulted only in permanent partial disability and that the disability did not cause employee to be permanently and totally disabled in and of itself, the next issue is the Second Injury Fund's liability. In order to establish a Second Injury Fund liability for permanent total disability benefits, the employee must prove the following:

1. That he has permanent disability resulting from a compensable work related injury. (See §287.220.1 RSMo 1994). This requirement has already been met and the determination of that percentage of that disability has been made pursuant to a settlement and stipulation entered into between the employee and the employer for 12.5% permanent partial disability to the body as a whole;

2. That he has permanent disability predating the compensable work-related injury which is of such seriousness as to constitute a hindrance or obstacle to employee to obtain reemployment if the employee becomes unemployable. §287.220.1 RSMo 1994; Messex v. Sach's Electric Company, 989 S.W. 2nd, 206 (Mo.App. 1997); Garribay v. Treasurer, 964 S.W. 2nd 474 (Mo. App. 1998); Rose v. Treasurer, 889 S.W. 2nd, 563 (Mo. App. 1995); Leutzinger v. Treasurer, 895 S.W. 2nd, 591 (Mo. App. 1995); Wuebbling v. West County Drywall, 898 S.W. 2nd, 615 (Mo. App. 1995). Dr. Koprivica noted that employee did in fact suffer permanent disability predating the compensable work-related injury, including disability to his back of 20%, as well as disability to his finger of 25%, Dr. Schmidt also believed that employee suffered a psychological disability due to a combination of his childhood trauma and his experiences in Vietnam creating post-traumatic stress disorder as well as psychological injury due to his traumatic brain injury from his motor vehicle accident in 1980, all culminating in a 25% permanent partial disability to the body as a whole, all predating his last accident;

3. That the combined effect of the disability resulting from the work-related injury and the disability that is attributed to all conditions existing at the time of the last injury was sustained results in a permanent total disability. Boring v. Treasurer, 947 S.W. 2nd, (Mo. App. 1997); Reiner v. Treasurer, 837 S.W. 2nd, 383 (Mo. App. 1992); Frazier v. Treasurer, 869 S.W. 2nd, 152 (Mo. App. 1994). This last requirement establishing Second Injury Fund liability is to prove that the employee is permanently and totally disabled as a result of the combined effects of all his

disabilities. The first part of this inquiry involves the findings as to whether the employee is permanently and totally disabled. §287.020.7 RSMo 1986 defines total disability as “the inability to return to any employment and not merely the inability to return to employment in which the employee was engaged at the time of the accident.” It is clear that employee suffered from disabilities predating the compensable work-related injury which were of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the employee became unemployed. The disability to his back caused him problems with being able to lift and carry, as noted by a 70 pound weight restriction implemented in 2003 by Dr. Buzard. Also of significance is his preexisting psychological condition which caused him difficulty in working with others, maintaining consistent job employment, as well as understanding and learning new jobs. Dr. Koprivica found employee to be permanently totally disabled. This Court finds that determination to be reasonable. The next step is to determine if such permanent disability is due to only the last injury alone or a combination of the last injury and the preexisting injuries. Dr. Koprivica found employee’s permanent total disability to be due to a combination of his preexisting conditions, as well as his last injury. This Court finds this opinion to be credible and further finds there is no other evidence to contradict such findings. Wherefore this Court, based on the above and foregoing, finds that employee is permanently and totally disabled due to the combination of his preexisting disabilities and the disability from his injuries from the last accident.

This Court finds the employee is entitled to permanent total disability from the Second Injury Fund. The Second Injury Fund is therefore ordered to pay weekly permanent total disability payments to the employee for life commencing May 11, 2004 in the sum of \$334.67. The Second Injury Fund shall be given a credit of 50 weeks of permanent partial disability as paid by the employer in the amount of \$334.67 per week and thereafter, the Second Injury Fund shall be liable for permanent total disability benefits in the amount of \$334.67 per week for employee’s life.

This Court awards to claimant’s attorney, Frank Eppright, 25% of all benefits awarded herein.

Made by: _____
Emily Fowler
Administrative Law Judge
Division of Workers’ Compensation

This award is dated, attested to and transmitted to the parties this ____ day of _____, 2010, by:

Naomi Pearson
Division of Workers’ Compensation