

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

Injury No.: 03-129583

Employee: Scott Mertz  
Employer: Ameren UE  
Insurer: Self-Insured  
c/o CCMI  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: December 22, 2003  
Place and County of Accident: St. Louis

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 October 24, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued October 24, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 5<sup>th</sup> day of March 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Dependents: n/a

Employer: Ameren UE

Additional Party: Second Injury Fund

Insurer: Self c/o CCMI

Hearing Date: July 20, 2006

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: KMH

### 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? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: December 22, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis
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 pulling cable when he strained his low back.
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: Low back and right leg
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: \$8,329.20
16. Value necessary medical aid paid to date by employer/insurer? \$9,197.20

Employee: Scott Mertz

Injury No.: 03-129583

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$1154.00
19. Weekly compensation rate: \$662.55/\$347.05
20. Method wages computation: Stipulation

### COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: None

TOTAL: NONE

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 n/a of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Scott Mertz

Injury No.: 03-129583

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: Ameren UE

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Self c/o CCMI

Checked by: KMH

A hearing was held on the above matter July 20, 2006. Attorney Bob Keefe represented Scott Mertz (Claimant). Attorney Pat Patterson represented Ameren UE (Employer). Assistant Attorney General Tracey Cordia represented the Second Injury Fund (SIF).

## STIPULATIONS

The parties stipulated to the following:

1. Claimant sustained an injury by accident on December 22, 2003, while in the course and scope of his employment in St. Louis, Missouri.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation Law. Employer was self-insured and had notice of the injury. A claim for compensation was filed within the time

prescribed by law.

3. Claimant's average weekly wage was sufficient to entitle him to the maximum rates of \$662.55 and \$347.05 for temporary total and permanent partial disability respectively.
4. Claimant has been paid \$8,329.20 in temporary benefits representing 12 4/7 weeks. Claimant has received \$9,197.20 in medical benefits.

## **ISSUES**

The parties stipulated the issues to be resolved are as follows:

1. Medical Causation
2. Nature and Extent of Claimant's Permanent Partial or Permanent Total Disability
3. Second Injury Fund Liability

## **FINDINGS OF FACT**

Based on the competent and substantial evidence, I find:

1. Claimant is a 56 year-old male who injured his low back while working for Employer on December 22, 2003.
2. Prior to working for Employer, Claimant worked as a welder and was self-employed with a home repair business.
3. Claimant began working for Employer in 1985 as a janitor. He went through training with Employer and worked as a lineman for 13 years until his termination in April 2004. Claimant's duties as a lineman involved loading trucks, digging holes, setting poles, climbing poles, and transferring wires. This was heavy and strenuous work.
4. On December 22, 2003, he was working in a ditch pulling cable. As he was pulling the cable, he felt a pop in his back and had immediate pain. He immediately reported the injury to Employer and was sent to Barnes Care that day.
5. Claimant was taken off work and treated at Barnes Care for about 1 week. He presented to Barnes Care with complaints of pain from his neck to his right foot. He noted a catching sensation in his back and felt his leg buckles causing him to fall. He was sent to physical therapy and given medications. An MRI was performed January 5, 2004, and Claimant was referred to Dr. Reinsel.
6. On January 16, 2004, Dr. Reinsel saw Claimant and noted he had catching in his low back with shooting or stabbing sensations and numbness in his right thigh. Claimant reported he had a prior injury with the same basic symptoms. Dr. Reinsel reviewed the January 5 MRI and found no significant change from Claimant's 2001 MRI. He diagnosed a lumbar strain with preexisting degenerative disc disease and ordered additional physical therapy and epidural steroid injections. Claimant felt these injections did not help his pain. He discussed the possibility of surgery with Dr. Reinsel and advised the doctor he had discussed surgery with Dr. Mirkin two years ago. Dr. Reinsel did not believe surgery was indicated and recommended Claimant get a second opinion.
7. Claimant then saw Dr. Coyle. He reviewed Claimant's January 5, 2004, MRI and his 2000 and 2001 MRIs and found no significant change between any of them. He opined Claimant had aggravated his previous symptoms and did not believe surgery was indicated. He recommended continued conservative care.
8. Claimant then treated with Dr. Katz from March 11, 2004 through April 21, 2004. At his first visit with Dr. Katz on March 11, 2004, Claimant stated he didn't feel he could perform light duty. He felt he could not walk more than a half mile and couldn't sit more than ten minutes. Dr. Katz ordered additional physical therapy, and by March 26, 2004, Claimant noted some improvement. By his April 8, 2004 visit, he felt significantly better and Dr. Katz recommended Claimant return to work. Dr. Katz noted on April 21, 2004, Claimant advised his back was almost like it was before his 2003 accident. Claimant testified at trial that he did not tell Dr. Katz his back was as good as before.
9. Claimant has had no other treatment to date. He no longer sees his chiropractor since he has no health insurance.
10. Claimant's TTD was terminated in March 2004 when Dr. Katz released him. He attempted to get his job back through the Union but was unsuccessful. He has had no income since that time. He applied for unemployment but was denied. The Division of Employment Security found he was terminated for cause. Claimant did look for work in

the electrical field. He testified he felt he could “possibly” work as an electrician.

11. Claimant has been working at RE/MAX. He trained through their school and earned his real estate license this year. He has not gotten any listings yet and has not made any money yet through RE/MAX. He believes he can handle working in real estate because he is able to make his own hours and work around his pain.
12. Claimant testified he needs to lie down at least three times a day for 30-45 minutes to relieve his back pain. If he does not, he cannot function. He continues to have back and right leg pain and takes six to eight Ibuprofens a day.
13. Prior to his 2003 work injury, Claimant injured his right elbow in 1998 and his low back in 2000. As a result of his right elbow injury, he underwent surgery, but he continues to have burning in his elbow when swinging a hammer or a wrench. He also has difficulty lifting, has pain and has a loss of grip strength. This injury settled in 2002 for 22% of his right elbow.
14. Claimant’s 2000 back injury was also work related. He underwent extensive conservative treatment and settled that case for 18.75% of the low back on March 24, 2003. Claimant testified he continued to have problems with his low back after that case settled. His back continued to ache all the time, he could not jump fences which linemen do a lot, he had difficulty bending and climbing, and he had to be careful how he lifted. He occasionally missed work due to back pain. Due to his continuing back complaints, Claimant took Ibuprofen and treated on his own with a chiropractor from May 2001 until his last visit of December 18, 2003.
15. Claimant testified from 2000 through 2003 his complaints were in his back only and he had no radiation into his legs. He testified that before his 2003 injury, he had none of the catching in his back, none of the stabbing pain into his right lower back and hip and none of the pain into his right leg and ankle that he has now. He simply had a back ache and soreness before 2003 and he could still climb at work. He testified that now his right leg gives out on him daily and he falls sometimes.
16. Claimant had other health problems before 2003. He had been diagnosed with anxiety, allergies, and insomnia. He was and continues to take medications for all of these conditions.

### **RULINGS OF LAW**

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

#### **1. Claimant’s current back problems are not medically and causally related to his December 22, 2003 injury.**

The Claimant has the burden of proving all the elements of his case including medical causation. *Welker v. M.F.A. Central Cooperative*, 380 S.W. 2d 481, 487 (Mo.App. 1964). He also has the burden of proving a causal connection between the accident and the injury. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195, 198 (Mo.App. E.D.1990).

I find Claimant has failed to establish his current back complaints are the result of his December 22, 2003 work injury.

Claimant had a serious back injury in 2000. He treated for several months and had two MRIs . Both of those MRIs were interpreted as showing Claimant had degenerative disc disease, a central bulge at L5-S1 with an annular tear or fissure at that level. Claimant had another MRI after his 2003 work injury. Dr. Reinsel, Dr. Coyle, and Dr. Katz agreed there was no significant change in the MRI findings from 2000 to 2003. There was no additional pathology following the 2003 work injury.

Claimant testified he had significant ongoing complaints in his low back following his 2000 injury and up until his 2003 injury. He had such significant pain that he treated almost twice a week with a chiropractor from May 2001 until December 18, 2003. Claimant advised Dr. Volarich the only reason he was able to continue working after his 2000 back injury was because he regularly saw his chiropractor.

Claimant was evaluated in 2002 by his own medical expert, Dr. Volarich. At that time, Claimant told Dr. Volarich he had low back pain 24 hours a day, 7 days a week which radiated into his right flank. He complained of pain radiating into his neck. He complained he could not sit more than 15 minutes without an increase in pain, he could not lift more than 50 pounds and driving caused pain in his back. He also complained he could not run, jump or play basketball and that his sleep was poor due to pain. Dr. Volarich imposed restrictions and assessed a PPD of 25% of the spine due to an annular tear at the L5-S1 level and aggravation of his degenerative disk disease.

Dr. Volarich also evaluated Claimant in 2004, imposed restrictions and assessed Claimant’s PPD. At that time, Claimant advised Dr. Volarich all of his current symptoms were present before his 2003 injury, but they worsened following

that injury. The restrictions Dr. Volarich imposed following the 2003 injury are substantially similar to those imposed in 2002. While Dr. Volarich also diagnosed a L5-S1 disc protrusion following the 2003 injury and not the 2000 injury, his diagnosis is based on the report of a radiologist who stated there was no significant change between the 2001 and the 2004 MRI.

Claimant also testified he had no leg problems from his 2000 injury. However, a review of the treating records following that injury shows otherwise. In March 2000, Dr. Mirkin found Claimant had right sided radiculopathy and recommended a series of epidural steroid injections (ESIs). Claimant saw Dr. Graham for the ESIs in March and April 2000. His reports indicate Claimant said in March 2000 his shooting pain into his right lower extremity had resolved after his injection, but he still had pain in his low back and leg. Claimant saw Dr. Albana in 2001 and completed a pain chart which showed he had complaints into his low back, right hip, right thigh and right knee. Claimant also completed a pain chart when he began treating with his chiropractor, Dr. Casey, in May 2001. That chart reveals Claimant had pain in his low back, right side, right hip, and right leg all the way to the ankle. Claimant advised Dr. Casey he had aching, burning, and numbness that radiated to his hip, leg and thigh. Claimant continued to see Dr. Casey continuously until December 18, 2003. At that time, Claimant had low back pain with spasm. This was just four days before his 2003 work injury.

The medical records establish Claimant continued to have significant pain in his back and legs following his 2000 injury and up until his 2003 injury. Claimant was released from treatment in April 2004 and advised Dr. Katz his back felt almost like it did before his 2003 injury. I find Claimant's current complaints are not medically and causally related to his 2003 injury.

## **2. Claimant has sustained no additional permanent disability as a result of his 2003 injury.**

Claimant alleges he is permanently and totally disabled as a result of his 2003 injury in combination with his prior injuries. Claimant has the burden of establishing the extent of his disability. *Carter v. Frito-Lay*, 913 S.W.2d 341, 345 (Mo.App., E.D. 1995). This burden is met through medical evidence proving the nature and extent of the permanent disability within a reasonable degree of medical certainty. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo.App. 1974).

The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. Total disability means the "inability to return to any reasonable or normal employment." *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849, 853 (Mo. App. 1995)(citations omitted), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).

The medical evidence does not support Claimant's contention that he is totally disabled. Claimant's own expert, Dr. Volarich, testified Claimant could work with restrictions unless a vocational expert could not find employment for Claimant. In that case, Dr. Volarich would agree Claimant is permanently and totally disabled. In essence, Dr. Volarich defers to the vocational expert.

Claimant's vocational expert, Jim England, testified he found Claimant unable to compete in the open labor market based on Claimant's subjective complaints. When looking at the opinions of the medical experts alone, Mr. England did not feel these supported PTD and Claimant at least could perform unskilled service employment.

I do not find Claimant's testimony regarding his complaints credible for a number of reasons. Claimant testified he did not have any radicular complaints until after the 2003 injury. However, multiple medical records document Claimant's complaints into his right leg before the 2003 injury. The pain drawings Claimant himself completed before his examinations with Dr. Albana and Dr. Casey reveal complaints of pain, numbness, aching and burning into his right leg all the way to the ankle. Claimant testified at trial he did not tell Dr. Katz he had returned to his pre 2003 injury complaint level. However, in his deposition, he admitted he told Dr. Katz in April 2004 that his back was almost like it was before the 2003 injury.

In addition, the activities depicted in the surveillance video of March 27, 2004, clearly show Claimant's abilities. Just days before this video was taken, Claimant reported to his physical therapist that he could only lift very light weights and his movements were slow. He said it was painful to care for himself and he could stand no more than 15 minutes. The therapist opined Claimant perceived himself as crippled. On March 19, 2004, Claimant had advised Dr. Katz the therapy had made him worse and Dr. Katz kept Claimant off work. These complaints are inconsistent with Claimant's abilities as documented in the video just one week later.

Claimant's 2000 back injury settled for 18.75% of his low back in May 2003. As noted above, Claimant continued to have significant complaints in his back and leg following this injury. He continued to treat with a chiropractor until days

before his 2003 injury. Claimant's expert did not substantially increase his recommended restrictions for Claimant following the 2003 injury.

Based on the evidence, I find Claimant is not permanently and totally disabled. I find Claimant returned to his pre-2003 injury baseline and has sustained no additional permanent disability as a result of his December 22, 2003, injury.

**3. Claimant is entitled to no benefits from the Second Injury Fund.**

Based on the conclusions above, Claimant's 2003 case is denied. Since Claimant's underlying claim against Employer has been denied, his claim against the Second Injury Fund is dismissed.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

KATHLEEN M. HART  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secrest  
*Director*  
*Division of Workers' Compensation*

Scott Mertz

Injury No: 03-129583