

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

Injury No.: 96-406153

Employee: Charles Nixon, deceased  
Dependents: Christina Nixon and Charles A. Nixon, III  
Employer: Pro Steel, Inc.  
Insurer: Missouri Employers Mutual Insurance Company  
Date of Accident: April 11, 1996  
Place and County of Accident: Jackson 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. 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 January 5, 2006. The award and decision of Administrative Law Judge Margaret Ellis Holden, issued January 5, 2006, 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 13<sup>th</sup> day of October 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

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

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

DISSENTING OPINION FILED

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

Attest:

\_\_\_\_\_  
Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no

involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of the administrative law judge.

---

William F. Ringer, Chairman

### DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified.

The administrative law judge erred in concluding that employee was permanently and totally disabled at the time of his death. I believe employee was employable in the open labor market at that time.

The opinion of Dr. Winkler that employee was 100% totally disabled is simply not credible or relevant to a determination of employee's employability in January 2000 for many reasons: he last saw employee one year after the traumatic injury; he gave his opinion 2½ years after he last examined employee and 3½ years after the accident; his opinion is based partially upon employee experiencing ulcerations (pressure wounds), a condition that resolved before employee's death; and, his opinion did not take into account that employee had troubling hardware removed from his spine.

Dr. Healy, on the other hand, last treated employee two years and four months after the accident and after the hardware removal surgery. Because employee was much farther into his recovery, Dr. Healy was in a decidedly better position to evaluate the nature and extent of employee's permanent disability than was Dr. Winkler. Dr. Healy believed that employee sustained a physical impairment of 70% of the body as a whole due to his spinal cord injury. I find the opinion of Dr. Healy more credible than the opinion of Dr. Winkler.

The administrative law judge relied significantly upon the opinion of Mr. Swearingin, vocational expert, in reaching her conclusion that employee was permanently and totally disabled at the time of his death. The opinion of vocational expert Mr. Lala is more credible than the opinion of Mr. Swearingin. Mr. Lala interviewed employee's widow on two occasions. He considered her first-hand observations of employee's mobility and activity level in the period immediately preceding employee's death in formulating his opinion regarding employee's employability. Mr. Swearingin did not speak with the widow at all. Mr. Lala properly considered employee's condition at the time of his death in forming his opinion that employee was employable in the open labor market. Among the factors Mr. Lala considered were employee's relative youth, his desire to return to work, his mobility, and his transferable mechanical skills (acquired in the Marines and maintained through his hobby of working on motorcycles and cars) in concluding that employee was employable. Mr. Lala testified that he had successfully placed paraplegics in motorcycle mechanic positions in the past.

Mr. Swearingin admitted that he, too, had placed a paraplegic in a motorcycle mechanic position. Nonetheless, he concluded employee could not have worked as a motorcycle mechanic at the time of his death. Mr. Swearingin's opinion is lacking in that Mr. Swearingin was unaware of employee's level of activity and mobility at the time of his death nor was he aware of the mechanical training employee received while in the Marines.

The medical records confirm that employee had attained maximum medical improvement at the time of his death. His medical treatment was in the nature of ongoing medical care for his chronic condition such as periodic wound care.

I would award permanent partial disability benefits of 70% of the body as a whole to the dependents of employee pursuant to § 287.230 RSMo.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

---

John J. Hickey, Member

## **AWARD**

Employee: Charles Nixon (deceased) Injury No. 96-406153  
Dependents: Christina Nixon and Charles A. Nixon III  
Employer: Pro Steel Inc.  
Additional Party: n/a  
Insurer: Missouri Employers Mutual Insurance Company  
Hearing Date: 10/18/05 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: 4/11/96
5. State location where accident occurred or occupational disease was contracted: Jackson 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:  
EMPLOYEE FELL APPROXIMATELY TWENTY FEET ONTO CONCRETE.
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: PERMANENT TOTAL
15. Compensation paid to-date for temporary disability: \$90,610.59
16. Value necessary medical aid paid to date by employer/insurer? \$330,660.09

Employee: CHARLES NIXON Injury No. 96-406153

17. Value necessary medical aid not furnished by employer/insurer? 0
18. Employee's average weekly wages: \$600
19. Weekly compensation rate: \$400/\$257.29
20. Method wages computation: BY AGREEMENT

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses: \$0

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

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning 4/11/96, for Claimant's lifetime (Employee deceased 1/6/00).

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:

RANDALL REICHARD

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Charles Nixon (deceased) Injury No. 96-406153

Dependents: Christina Nixon and Charles A. Nixon III

Employer: Pro Steel Inc.

Additional Party: n/a

Insurer: Missouri Employers Mutual Insurance Company

On October 18, 2005, the parties appeared before the undersigned administrative law judge for a final hearing. The employer appeared represented by Rebecca Tatlow and the claimant, Christina Nixon, appeared in person represented by Randall Reichard.

The parties stipulated that on or about April 11, 1996, Pro Steel Inc., was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Missouri Employers Mutual Insurance Company. On the alleged injury date of April 11, 1996, Charles Nixon was an employee of the employer. The employee was working subject to the Missouri Workers' Compensation Law. The parties agree that on or about April 11, 1996, the employee sustained an accident which arose out of the course and scope of employment. This employment occurred in Jackson County, Missouri. The parties agree to venue in Springfield, Missouri. The employee notified the employer of his injuries as required by Section 287.420. The claimant's claim was filed within the time prescribed by Section 287.430. At the time of the claimed accident, employee's average weekly wage was \$600.00, sufficient to allow the compensation rate of \$400.00 for temporary total disability and 4257.29 for permanent partial disability benefits. Weekly disability benefits have been paid in the amount of \$90,610.59. These were paid up to the date of the employee's death, January 6, 2000. The parties disagree if this was temporary total disability or permanent total disability benefits. The employer has paid medical benefits in the amount of \$330,660.09. The employee's son, Charles A. Nixon III, is a dependent of the deceased employee and the parties stipulate that any benefits awarded will be paid to Christina Nixon, the claimant's mother, as her son's parent and natural guardian and such proceeds will be used for the claimant's care and benefit. The attorney fee sought is 25%.

#### ISSUES:

1. The nature and extent of any permanent disabilities, namely whether the employee was permanently totally disabled or permanently and partially disabled on the date of his death.

#### FINDINGS OF FACT:

On April 11, 1996, the employee, Charles Nixon, was 39 years old construction worker. He did not graduate from high school. His transcript shows no credits after the 10<sup>th</sup> grade. He had been a below average student, but later received a GED. He served in the Marine Corps in the 1970's and completed a Class A Aircraft Machinist Mate I. His work history consisted of construction work generally and particularly being a crane operator.

He was working at a worksite for the employer when he fell approximately 20 feet to a concrete surface. As a result of this fall, he suffered a head injury, fractured scapula, rib fractures, and a burst fracture at T12, which caused paraplegia. He underwent a posterior spinal fusion from T10 to T12 with pedicle screws and rods. He then underwent physical therapy. During the course of his medical treatment he had difficulty with decubitus ulcers, shoulder pain and abdominal pain. The

rods and screws were removed on August 20, 1998. This helped relieve the ulcers.

In June 1996, the employee was referred to Dr. Thomas Blansett, a neuropsychologist, for evaluation. His assessment took place over four separate occasions in order to accommodate employee's sitting tolerance and fatigue. Dr. Blansett performed therapy sessions in October through December 1996. The employee was difficult to work with and did not appear for several sessions. In a report of August 20, 1996, Dr. Blansett identified employee as suffering from a traumatic brain injury, having residual cognitive difficulty and adjustment disorder.

Dr. Terry Winkler was a treating physician. In a letter dated August 23, 2000, Dr. Winkler stated that he felt Mr. Nixon was 100% totally disabled as a result of his spinal cord injury, severe scoliosis, neuropathic pain and decubitus ulcers, all resulting from his spinal cord injury.

Dr. Brain Healy rated the claimant on February 9, 2001. He felt the claimant had a disability of 70% of the body as a whole.

Wilbur Swearingin, a certified Vocational Rehabilitation Consultant, performed an evaluation of the employee's employment potential on October 4, 2005. He concluded that:

Charles may have had the potential to have completed one to two years of vocational instruction, such as is commonly found in a community technical college or proprietary trade school, in a program which emphasized hand on instruction. Mr. Nixon's brain injury, with resulting memory, attention and executive functions deficits would make his prognosis for completing training guarded. Charles Nixon was clearly not prepared for college. Charles' high school transcript indicated poor academic progress, with a few credits needed for graduation. Mr. Nixon was not a candidate for college prior to his injury and the residuals of his traumatic brain injury further impaired his potential for advanced education.

At the time of his death, in January of 2000, Charles Nixon was not employed, had not worked since his injury, was not participating in vocational rehabilitation, and had not acquired additional education. Statistically, Mr. Nixon fell within the group, which had the least prospect for employment. His injury occurred after age thirty-eight, he had less than a high school education, and had both a spinal cord injury and traumatic brain injury. Beyond a reasonable doubt, Charles Nixon was permanently/totally disabled and neither employable nor placeable in any occupation in the open labor market.

The employee's ex-wife, Christina Nixon, testified. She and the employee were married at the time of his injury. She lived with him for approximately a year and one half after his injury and they subsequently divorced. She continued to see him about once a month. She testified that he wanted to return to work. She said that he had begun collecting guns and knives to sell at trade shows. She said that he also knew how to work on cars and motorcycles and would on occasion work on them after his accident. Jane House, employee's ex-mother-in-law testified that the employee had a positive attitude.

Mike Lala, a Certified Rehabilitation Counselor, testified on behalf of the claimant. He felt that the claimant was not permanently and totally disabled. In his opinion, the employee was highly skilled due to his training in the marines. He also felt that as a general rule persons who want to work are more likely to return to work. In his opinion the employee had transferable skills. He felt that the employee could have returned to work on a limited basis, not in the whole work force. On cross-examination he admitted that he did not know how many hours the

employee could work per day.

CONCLUSIONS OF LAW:

1. The nature and extent of any permanent disabilities, namely whether the employee was permanently totally disabled or permanently and partially disabled on the date of his death.

After carefully considering all of the evidence, I find that he employee, Charles Nixon, was permanently and totally disabled at the time of his death. Based on the evidence and the opinion of Mr. Swearingin, I conclude that the employee could not compete in the open labor

market. The employer and insurer had paid the employee's medical bills and weekly benefits in the amount of \$400 up to the time of his death. Therefore, no further benefits are due.

Date: January 6, 2006

Made by: /s/ Margaret Ellis Holden

Margaret Ellis Holden  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ Patricia "Pat" Secrest  
Patricia "Pat" Secrest  
*Director*  
*Division of Workers' Compensation*