

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

Injury No.: 06-129192

Employee: Doug Nord
Employer: City of St. Charles (Settled)
Insurer: Self-Insured (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 § 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 23, 2011, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued December 23, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 14th day of June 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Claimant: Doug Nord

Injury No. 06-129192

Dependents: None

Employer: City of St. Charles (settled)

Additional Party: Second Injury Fund

Insurer: Self-insured (settled)

Hearing Date: September 20, 2011

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: GCG/ln

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: Alleged March 31, 2006
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above Claimant in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work Claimant was doing and how accident occurred or occupational disease contracted: Claimant alleges he sustained injury to his low back from repetitive use and traumatic impact from riding in fire trucks.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Alleged low back.
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: Not applicable
16. Value necessary medical aid paid to date by employer/insurer? Not applicable

- 17. Value necessary medical aid not furnished by employer/insurer? Not applicable
- 18. Claimant's average weekly wages: \$1,045.66
- 19. Weekly compensation rate: TTD \$696.97/PPD \$365.08
- 20. Method wages computation: stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: (settled)

22. Second Injury Fund liability: No

TOTAL: 0

23. Future requirements awarded: None

Said payments to begin as of the date of this award 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:

Keith Link

Claimant: Doug Nord

Injury No. 06-129192

FINDINGS OF FACT and RULINGS OF LAW:

Claimant: Doug Nord

Injury No: 06-129192

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: City of St. Charles (settled)

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

Additional Party Second Injury Fund

Insurer: Self-insured (settled)

Checked by: GCG/ln

PRELIMINARY STATEMENT

The parties appeared before the undersigned Administrative Law Judge on September 20, 2011 for a final hearing to determine the liability of the Second Injury Fund in the matters of Doug Nord (Claimant). Attorney Keith Link represented Claimant. Assistant Attorney General Caroline Bean represented the Second Injury Fund. Employer, City of St. Charles, previously settled with Claimant and did not participate in the hearing. The hearing for this injury was held in conjunction with Claimant's other cases. The three Injury Numbers are as follows: 02-052025, 03-113105, and 06-129192. Mr. Link requested a fee in the amount of 25%. The parties filed proposed awards subsequent to the hearings.

The parties stipulated to the following:

1. Claimant alleges an occupational disease arising out of and in the course of employment that resulted in injury to Claimant with an injury date of March 31, 2006. The alleged injury occurred in St. Charles County, Missouri.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
3. Venue is proper in St. Charles County.
4. Employer received proper notice of the claim.
5. Claimant filed the claim within the time allowed by law.
6. The applicable rates of compensation are \$696.97 for total disability benefits, and \$365.08 for permanent partial disability (PPD) benefits.

Claimant: Doug Nord

Injury No. 06-129192

The issues to be determined are:

1. Medical causation of occupational disease; and
2. Liability of the Second Injury Fund.

SUMMARY OF THE EVIDENCE

Only evidence necessary to support this Award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

Exhibits

The following Exhibits were offered into evidence:

Claimant's Exhibits:

- A Deposition of Samuel Bernstein, Ph.D. and Deposition Exhibits A and B
- B Deposition of Dr. David Volarich and Deposition Exhibits 1 and 2
- C Claimant's Statement of Disability to the Employer dated July 6, 2007
- D Claimant's Application for Retirement from St. Charles City Fire Dept. dated March 2, 2006
- E Disability approval letter dated September 10, 2007
- F Certified Settlement Stipulations for Injury No's. 02-052025, 03-113105, 04-114812, and 06-129192
- G Certified files of Div. of Workers' Compensation for Injury No's. 89-121379, 97-462500, 01-063127, 02-052025, 03-090329, 03-113105, 03-142824, and 04-114812
- H St. Joseph's Health Center E.R. records for 11-30-1997 & 11-07-2003
- I Treatment records of Orthopedic for the period 2-5-1998 to 10-06-2005
- J Missouri Baptist radiology reports dated 2-10-1998 and 12-16-2004

Claimant: Doug Nord

Injury No. 06-129192

- K Treatment records of Dr. Michael Boland for the period 11-25-2002 to 5-25-2011
- L Treatment records of Heritage Physical Therapy for the period 3-30-2004 to 6-23-2004
- M Medical report of Dr. John Graham dated August 1, 2011

The Second Injury Fund's objections to Claimant's Exhibits C, D and E on the ground(s) of relevance and/or hearsay are sustained. Exhibits F and G were received into evidence over SIF objection. Exhibits A, B, H – M were received into evidence without objection.

SIF's Exhibits:

- I Deposition, CV & 10-13-08 report of Marvin R. Mishkin, M.D.
- II Deposition, CV and 6-2-10 report of vocational expert James England, Jr.
- III Depositions of the Claimant dated 9-19-2007 and 11-26-2007

Second Injury Fund Exhibits I and II were received into evidence without objection, Exhibit III was received over Claimant's objection.

Primary Injury

The Claimant is 60 years of age and last worked on March 31, 2006. Prior to March 31, 2006, he worked as a firefighter, paramedic, arson investigator and fire captain for the City of St. Charles Fire Department. The Claimant worked for this Employer for twenty seven (27) years, with the last twenty four (24) years in the position of Fire Captain. On March 31, 2006, the Claimant left the St. Charles City Fire Department and applied for duty related disability benefits, which were approved.

Claimant sustained a work related injury to his low back May 31, 2002 and another work injury affecting his right arm in November 2003. The history and treatment regarding these injuries are chronicled in the Awards in Injury Number 02-052025 and Injury Number 03-113105. Following his 5/31/02 injury and his December 2002 back fusion Claimant was off for three months and then on light duty for three months. Claimant was released back to work full duty in June 2003 with the only restriction of no repetitive bending, twisting while lifting. Following his 11/07/03 wrist injury, Claimant was first put on light duty and released back to work full duty in July 2004. On 11/1/04 Claimant was put on light duty by Dr. Wagner following a flare-up of back pain.

Following his second fusion surgery on 3/18/05, he was off for 6 months and returned to light duty in early July 2005 conducting fire code inspections throughout St. Charles City until his retirement in March 2006. He has not filed for SS disability.

Claimant: Doug Nord

Injury No. 06-129192

On 5/31/02, claimant was testing fire hydrants when he felt sharp shooting pains in his back. Before this injury, claimant was working full time without restrictions. Claimant went to see Dr. John Wagner who ordered x-rays and an MRI. Claimant was then referred to Dr. Michael F. Boland. Dr. Boland's impression was chronic intermittent back pain, activity related, with a normal neurologic examination, related to isthmic spondylolisthesis L5-S1. Dr. Boland concurred with Dr. Wagner to go ahead and perform a lumbar fusion L5-S1. On 12/10/02, claimant underwent a L5 Gill procedure with bone fusion and instrumentation. Following the December 2002 surgery, Claimant was off work for 12 weeks, on light duty for 12 weeks, after which Dr. Boland returned him to full duty on 6/10/03. X-rays showed Claimant's fusion mass to be solid.

In March 2004, Claimant told Dr. Wagner he was having more back pain especially when doing his workout. Dr. Wagner recommended an MRI and physical therapy. On 4/6/04 Dr. Wagner reviewed the MRI and noted that due to the bulging and degenerative disc disease there would be some decompression due to the fusion. Two weeks later Claimant was able to return to work without restrictions.

On 9/27/04 Claimant filed a report of injury, he had no specific injury, but had pains going from sitting to standing, and it took several steps and some hip rotational movements to loosen up before his leg would support him. Dr. Wagner saw him on 11/01/04 regarding increasing symptoms in his low back. Physical exam revealed slight loss of motion in the lower lumbar spine. An MRI on 12/22/04 showed some possible edema of the pedicle at L4 which prompted a CT of the lumbar spine. On 12/16/04 the CT showed that a solid fusion at L5-S1 was not present on either side. On 12/21/04 Dr. Wagner noted that the bone and CT scan showed what appeared to be pseudoarthrosis of the fusion mass and some evidence of looseness of the screws.

The doctor noted that on November 2003 Claimant had been involved in another accident at work where he was carrying a fire hose and was pulled into a moving truck. He had fractured his right wrist and torn his right rotator cuff. He also had onset of back pain after that injury, which had steadily gotten worse. The doctor's impression was failed fusion at L5-S1 with additional structural change involving the L4-5 facet on the right side that contributed to the foraminal stenosis affecting the course of the L4 nerve root.

On 3/21/05, Claimant underwent an L3-S1 spinal fusion for treatment of pseudoarthrosis at L5-S1 and degenerative facet disease at L4-5. Post-op Claimant had relief of right hip and anterior thigh pain and his back was improving. He was walking 2-3 miles per day by 5/4/05 and wore a corset and bone stimulator. He continued with physical therapy and restrictions were relaxed to allow lifting up to 20 pounds but with no repetitive bending. Dr. Boland continued him off work.

On 8/15/05, Dr. Boland reported Claimant had finished physical therapy and had returned to light duty after his last visit. Claimant told Dr. Boland most days were good days but would occasionally have a sharp brief pain at the belt line precipitated by a twist.

Claimant: Doug Nord

Injury No. 06-129192

On 10/16/05, Dr. Boland noted Claimant was making excellent progress and was taking no pain meds. Light duty was continued. On 1/18/06 Dr. Boland stated Claimant was rapidly approaching MMI, was walking extensively, and would undergo a CT scan.

On 3/15/06 Dr. Boland reviewed the CT scan with Claimant and reported it showed a solid fusion from L3 to S1 without loosening of the pedicle screw instrumentation. He placed Claimant at MMI. Dr. Boland stated that given the nature of his injury in the past and the fact that he had a lumbar fusion, Claimant was not fit to perform the regular duties of a firefighter. He gave him work restrictions of 20 pounds lifting, no repetitive bending, no working at unprotected heights, no pushing or pulling greater than 20 pounds.

On 4/11/06 Dr. Boland rated Claimant's back at 20% PPD in addition to whatever Dr. Wagner had ascribed in the past. At the time of his 2007 deposition Claimant's only medication was Aleve x 2 a day as needed.

On 5/25/11, Claimant returned to see Dr. Boland with complaints of right low back pain. Physical exam showed good lower extremity power, ability to walk on heels and toes, mild tenderness over the sacroiliac joints bilaterally. MRI in September 2010 showed no stenosis or disc herniation. X-rays of lumbar spine taken on 5/25/11 showed no instability or degeneration above the fusion. The sacroiliac joints showed little arthritis. There was no indication for any surgical intervention. Claimant needed to stay active and continue with his exercise regimen. Potential risk for requiring any additional surgery was 15%.

On 8/1/11, five years after his retirement, Claimant went to see Dr. Graham, a pain management doctor. At that time, Claimant reported low back pain at the belt line without radiation with twisting activities such as fly-fishing and washing his fifth wheel. On examination Dr. Graham observed a normal gait, no limp, ability to stand on his toes, heels and squat. Claimant changed positions with ease and without assistance including getting on and off the exam table. Straight leg raising was normal, muscle tone in lower extremities. At that time Dr. Graham saw no need for a facet injection, epidural steroid injections or prescription for narcotic pain killers. Dr. Graham recommended continuation of home exercise program, continuation of Dr. Boland's restrictions, and provided Claimant with a prescription for Ultram 50 mg as needed.

On 3/13/07 Claimant filed an occupational disease claim through 3/16/06 for injury to his low back for injury occurring while in the course of his regular employment performing his duties as a firefighter.

Dr. Marvin Mishkin, a board certified orthopedic surgeon testified by deposition on behalf of the employer and the Fund. Dr. Mishkin saw Claimant on 10/13/08 to perform an independent medical examination at the request of the employer. Dr. Mishkin examined the Claimant, took a medical history, and reviewed his medical records and diagnostic tests. On 10/13/08 Claimant reported intermittent pain in his low and midback if he sat, stood or walked too long. But the pain was not constant. He took Naprosyn but not on a regular basis and had not taken it for at least a week. Claimant advised Dr. Mishkin that he currently walked up to two miles a day multiple times a week. He had a recurrence of knee pain while performing his activities and had a second arthroscopic surgery to his left knee in February of 2008. During the

Claimant: Doug Nord

Injury No. 06-129192

physical examination Dr. Mishkin noted Claimant walked easily and without difficulty. His neck and back were straight. There was no swelling. Palpation of the regions of the back elicited no soreness or pain. Claimant was able to stand and touch his ankles. His right shoulder and elbow had good range of motion. Based on his examination, Dr. Mishkin concluded Claimant had excellent range of motion in his back and could bend and touch his toes without discomfort or pain.

Dr. Mishkin rated permanent partial disability of the low back L3-S1 area at 15% BAW. Dr. Mishkin noted Claimant did return to work following the incidents of 11/7/03 and 9/27/04 and performed his occupational activities. Claimant advised Mr. Mishkin that no injury occurred on 3/31/06. It was Dr. Mishkin's opinion Claimant was employable and capable of performing occupational duties. Dr. Mishkin gave Claimant restrictions of no lifting over 20 pounds and avoid repetitive bending. In view of the fact that a firefighter may be put in a position where he had to do strenuous activities it was Dr. Mishkin's opinion Claimant should not return to work as an active firefighter, however he could do less strenuous jobs such as supervising others and inspections.

Dr. Volarich testified by deposition on behalf of the Claimant. Dr. Volarich performed an independent medical examination of Claimant on 10/26/09. Dr. Volarich obtained a medical history from Claimant; reviewed medical records provide by claimant's counsel and performed a general physical and neurological evaluation. Dr. Volarich noted Claimant could lift 20 pounds if he kept his arms close to his body. Claimant took Tramadol as needed though he tried to maintain without it. Claimant reported having to stand, walk and stretch if he sat more than two hours. He is able to dress himself, do the vacuuming, sweeping, mopping, shopping and drive 1-2 hours at a time.

For the 5/31/02 injury, which required two fusion surgeries, Dr. Volarich rated Claimant's back at 50% PPD. For the 11/7/03 injury, Dr. Volarich rated 5% of the spine, 35% of the wrist, 40% of the right shoulder and 20% of the right elbow. It was Dr. Volarich's opinion that the claim of 9/27/04 was not a new injury to the low back but a progressive worsening of the back due to pseudoarthritis. It was further his opinion that the second surgical repair was a direct result of the first accident of 5/31/02.

It was Dr. Volarich's opinion that the repetitive trauma, including the trauma of riding in a fire truck leading up to 3/31/06, was the substantial contributing factor as well as the prevailing or primary factor causing the progression of back pain syndrome that required conservative treatment. For the 3/31/06 claim Dr. Volarich rated 15% PPD due to performing duties as a firefighter as well as impact trauma to his low back riding in the fire truck.

With regards to his back, Dr. Volarich gave Claimant restrictions of bending, twisting lifting, pushing, pulling, carrying, climbing, avoid handling weights greater than 15-20 pounds, changing positions every 30 minutes and pursue stretching, strengthening, and non-impact aerobic conditioning such as walking, biking, or swimming. With regards to his right elbow and shoulder Claimant was to minimize repetitive gripping, pinching, squeezing, pushing, pulling, and twisting rotary motions and similar tasks as tolerated. Use anti-vibration gloves and avoid overhead or prolonged use of right arm away from his body. Claimant could handle weight to

Claimant: Doug Nord

Injury No. 06-129192

tolerance with the right arm extended away from the body, overhead or assuming proper lifting techniques.

Dr. Volarich opined Claimant was unable to perform in any substantial gainful activity. It was further his opinion he was unable to continue in his line of employment that he last held as fire captain, nor could he be expected to return full time in a similar job. Based on his medical assessment alone, Claimant was permanently disabled as a direct result of the work related injuries of 5/31/02, 11/7/03 and leading up to 3/31/06 in combination with each other and his pre-existing medical conditions.

On cross-examination from the Employer and the Fund Dr. Volarich agreed that regarding the alleged 3/31/06 claim, he rated the 15% for additional symptoms developing between the time Claimant stopped active treatment with Dr. Boland in December 2005 and his retirement in March 2006. Dr. Volarich agreed the Claimant told him it was specifically the riding in the truck during that period that caused that injury. Dr. Volarich thought that 3/31/06 was the date Claimant stopped working. Dr. Volarich agreed Claimant stopped working because he could not return to full duty work. It was further his understanding that up until that date he was working light duty with no lifting over 20 pounds. Dr. Volarich agreed that prior to May 2002, Claimant was working full duty with no restrictions.

FINDINGS OF FACT & RULINGS OF LAW

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); see also *Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo.1968); *McCoy v. Simpson*, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing *Cook v. Sunnen Prods. Corp.*, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)).

Further, the Division is charged with the responsibility of passing upon the credibility of witnesses. It may disbelieve testimony of a witness even though no contradictory or impeaching information is introduced. *Lawson v. Emerson Electric Co.*, 833 S.W.2d 467, 470 (Mo.App., S.D. 1992); *Page v. Green*, 686 S.W.2d 528, 530 (Mo.App., S.D. 1985). Contradictory or impeaching evidence may infer that the claimant did not carry a burden of proof upon a particular element of a claim. *Lawson*, supra.

On 3/13/07 Claimant filed an occupational disease claim through 3/16/06 for injury to his low back for injury occurring while in the course of his regular employment performing his duties as a firefighter. This claim appears to be duplicative of his prior 5/31/02 back injury for which Dr. Boland found Claimant to be at MMI on 3/15/06. At hearing, Claimant's counsel amended the 11/03/03 claim to a PTD claim against the Fund.

Claimant: Doug Nord

Injury No. 06-129192

The Fund is only responsible for permanent and total disability benefits where the work injury combines with some preexisting condition to render the individual permanently and totally disabled. Section 287.220, RSMo 2000. In the present case Claimant has not proven he is entitled to benefits from the Fund for the 3/31/06 claim in combination with any other injuries because he has failed to prove it was a compensable injury.

Claimant advised Dr. Mishkin on 10/13/08 there was no injury on 3/31/06 or injury report. Claimant stated it correlated with the date of his retirement and he wanted it on his record that he was having problems with his back and extremities.

During his 9/19/07 deposition, when questioned regarding the 3/31/06 claim the Claimant testified as follows:

Q. Mr. Bidstrup, for employer

“Let’s do the 3/31/06 injury. You had resigned on 3/29 and you actually quit working in the middle of March of ’06?”

A. Claimant

“All right. 3/31/06—I don’t know why that’s written up as a separate incident other than that is around the period of time my doctors stating that I would not be okayed to come back to work. It wasn’t a separate injury or anything else.But why there is a 3/31/06 I don’t know other than that’s the way it was filed because that’s when my doctor’s report was received. It wasn’t a separate injury.”

The treating doctor’s records for the Claimant’s back all relate to the Claimant’s 2002 injury and the resulting surgeries. The only doctor who provides a rating for the alleged 3/31/06 claim is Claimant’s own expert Dr. Volarich. Dr. Volarich’s 10/29/09 report includes few details concerning the alleged 3/31/06 injuries, yet he concludes that the repetitive trauma including the trauma riding in the fire truck leading up to 3/31/06 was the prevailing or primary factor causing the progression of his back and provides a rating of 15% PPD.

On cross-examination from Employer and the Fund, Dr. Volarich testified that with regard to the 3/31/06 injury, somewhere between the time Dr. Boland placed restrictions on the Claimant and stopped active treatment in December of 2005, and the time Claimant resigned in March of 2006, he developed an additional 15% PPD from riding in the fire truck, distinct from the symptoms produced by the two back surgeries.

The evidence does not support Dr. Volarich’s findings. During the period in question, December 2005 to March 2006, Claimant was on light duty. Claimant testified at hearing that he spent his days performing fire inspections, not riding on the fire truck. He further testified that he sustained no back injuries while on light duty. The medical reports note Claimant is working on light duty continuing to do well with only mild pain in the center of the back with lifting and twisting. There is no mention in the medical records of Claimant reporting problems with his back from riding on the fire truck. The only incident reported to Dr. Boland by the Claimant during that period is on 3/15/06. On that visit, Claimant reported an aching pain the day after lifting boxes weighing about 40 pounds moving into a new house six weeks earlier.

Claimant: Doug Nord

Injury No. 06-129192

The above evidence supports a finding that Claimant has not proven that he sustained a compensable injury on or leading up to 3/31/06. The totality of the evidence further supports a finding that Claimant is entitled to permanent partial disability, and not permanent total benefits from the Fund. Claimant sustained a compensable injury to his right hand, elbow and shoulder at work on 11/07/03. Claimant was treated for this injury and released by Dr. Strecker to full duty, with no restrictions, in July 2004. Following that injury, Claimant continued working for the fire department until his retirement in March 2006.

Prior to his 11/07/03 injury, Claimant sustained an injury on 5/31/02 while testing a hydrant, resulting in two surgeries and permanent restrictions by treater Dr. Boland of no lifting above 20 pounds, no repetitive bending, no working at unprotected heights, no pushing/pulling greater than 20 pounds.

CONCLUSION

The competent and substantial evidence establish that Claimant has failed to meet his burden of proof to establish he sustained a compensable occupational disease up to and including March 31, 2006. The claim for compensation against the Second Injury Fund is denied. All other issues are moot.

Made by: /s/ GRANT C. GORMAN
Grant C. Gorman
Chief Administrative Law Judge
Division of Workers' Compensation