

**FINAL AWARD ALLOWING COMPENSATION**

(Affirming Amended Award and Decision of Administrative Law Judge)

Injury No.: 06-129477

Employee: Terry L. O'Connor  
Employer: Construction Material Trucking, Inc.  
Insurer: Ace Property & Casualty Company

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 amended award and decision of the administrative law judge dated December 23, 2011. The amended award and decision of Administrative Law Judge Mark Siedlik, issued December 23, 2011, 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 3<sup>rd</sup> day of July 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T  
Chairman

\_\_\_\_\_  
James Avery, Member

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Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## **FINAL AWARD**

Employee: Terry L. O'Connor Injury No: 06-129477  
Employer: Construction Material Trucking, Inc.  
Insurer: Ace Property & Casualty Company  
Hearing Date: August 25, 2011 Checked By: MSS/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: January 24, 2006
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 of accident? 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 was sitting in parked truck that overturned 90 degrees into excavation.
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: Left upper arm

14. Nature and extent of any permanent disability: 7.5% left shoulder at the 232 week level.
15. Compensation paid to-date for temporary disability: \$0 (zero).
16. Value necessary medical aid paid to date by Employer/Insurer? \$197.00
17. Value necessary medical aid not furnished by Employer/Insurer? \$17,180
18. Employee's average weekly wages: \$592.00 (by agreement).
19. Weekly compensation rate: \$394.67 / \$365.08
20. Method wages computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable: \$6,352.39
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: None.

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

Employee: Terry L. O'Connor Injury No: 06-129477  
Employer: Construction Material Trucking, Inc.  
Insurer: Ace Property & Casualty Company  
Hearing Date: August 25, 2011 Checked By: MSS/cy

This hearing occurred on August 25, 2011, with Claimant appearing in person and with counsel, Brienne Niemann of Boyd & Kenter, and Employer/Insurer represented by Thomas D. Billam of Wallace, Saunders, Austin, Brown & Enochs, with Employer owners Earl Guest and Wayne Taylor.

It was then stipulated by the parties that: 1) on or about January 24, 2006, Construction Material Trucking, Inc., was an employer operating under the provisions of the Missouri Workers' Compensation Law, and that its liability under said Law was fully insured by Ace Property & Casualty Company; 2) that on or about January 24, 2006, Terry O'Connor was an employee of Construction Material Trucking, Inc., and was working under the provisions of the Missouri Workers' Compensation Law; 3) that Terry O'Connor's average weekly wage was \$592.00, resulting in a weekly temporary total disability compensation rate of \$394.67 and the maximum permanent partial disability weekly benefit of \$365.08; 4) that a formal written Claim for Compensation was filed within the time prescribed by law; 5) that medical aid had been furnished by the Employer/Insurer in the amount of \$197.00; 6) that no temporary total disability payments have been made by Employer/Insurer.

The parties have stated that the issues are injury, medical causation of any injury, past due medical, future medical care, past-incurred permanent total disability but no issue of temporary total disability. The parties had a slight disagreement as to average weekly wage but stipulated to \$592, resulting in a weekly benefit rate of \$394.67 / \$365.08. The parties agreed that the only medical benefits provided were \$197 paid by Employer for Dr. Steelman's care on the date of the accident, January 24, 2006.

## **ISSUES**

The only issue to be determined by this hearing was: 1) whether Claimant suffered any permanent injury arising from an accident January 24, 2006.

## **EVIDENCE**

### **A. Exhibits**

Claimant's evidence involved his own oral testimony, two Submissions of reports of Dr. James A. Stuckmeyer (Exhibits D and E), a deposition of vocational expert Terry Cordray (Exhibit I). Claimant also offered various Exhibits: a copy of the formal Claim (Exhibit A), medical records of Claimant (Exhibit G), deposition of Dr. Jeffrey T. MacMillan (Exhibit L), two Awards (Exhibit J and K), and medical bills (Exhibit H). Exhibits were marked as B and C, but were withdrawn by Claimant's attorney.

Employer/Insurer's evidence involved oral testimony of Earl Guest and Wayne Taylor, a Submission of Dr. MacMillan's report of November 28, 2007 (Exhibit 1), two pages of medical records of Dr. Steelman of January 24, 2006 (Exhibit 2, later withdrawn by Employer/Insurer as contained within the Exhibit 1), cross-examination of Dr. MacMillan (Exhibit 3, later withdrawn by Employer/Insurer's counsel in light of Claimant's offering the entirety of the deposition, as Exhibit L), driver log showing Claimant's driving hours in 2006 (Exhibit 4), and objection to Dr. Stuckmeyer's first Submission (Exhibit 5).

Employer/Insurer had raised objection to Dr. Stuckmeyer's first Submission (see Exhibit 5), which this Court renders moot pursuant to the second Stuckmeyer Submission (Claimant's Exhibit E). Employer/Insurer had objected to the deposition of Terry Cordray (Exhibit I) because there had been no showing that the witness was unavailable for trial and because the deposition had not been "read and signed" – as requested by the witness himself. Both of these objections were overruled and Claimant's counsel was instructed to provide the signature page for the deposition signed by Mr. Cordray without delay, both to this Court and to Employer/Insurer counsel. That signature page has been provided and Employer's Exhibit I is admitted. Employer/Insurer objected to the relevancy of Claimant's Exhibits J and K (unrelated Awards attempted to be used in questioning of Dr. MacMillan in Exhibit L). The Court took "judicial notice" of the certified copies of the Awards of other claimants, but this Court does not find any relevance or any precedential value of any comments or opinions therein, by other Administrative Law Judges. Employer/Insurer also objected as hearsay to the inclusion of any medical opinions about medical causation that may exist in the voluminous treatment records (Exhibit G). No depositions were taken of any such medical providers, none of these providers testified live, and no "submissions" were made under R.S.Mo. § 287.210. This Court noted the objections and withheld immediate ruling.

This Court has reviewed the extensive medical records by the Pennsylvania physicians. This Court finds it unnecessary to rule on objections to Employer's Exhibit 9 because no such medical causation opinions were located within these treatment records.

## **B. Testimony**

The oral testimony of Claimant delved into his background, education, prior jobs, and his driving job with Construction Material Trucking. Claimant recited he had passed his D.O.T. physical exam every two years, with the latest occurring in September/October of 2005. Claimant considered himself a "good employee," an evaluation that his employers later verified in their testimony.

Claimant testified about his parked truck sliding into an excavation. He had been sitting sideways in the parked truck, talking out the driver's window to another worker. Claimant then described the mechanism of injury and body parts struck when the truck slid into the ditch.

Claimant stated his employer took him to an occupational clinic the same day, and agreed that his only complaint the day of the accident was to his left arm/shoulder. Claimant was treated and released with no restrictions. Claimant stated he had returned to work the very next day, asserting to his employer that he could drive even though his shoulder was stiff and sore.

Claimant asserted he complained to Wayne Taylor either the day of the accident, or the next day about his neck being stiff, an assertion categorically denied by Mr. Taylor during his testimony. Claimant also asserted he complained about his neck roughly a week later, again to Mr. Taylor, which Mr. Taylor also denied. The Court finds the testimony of Mr. Taylor in this area more credible than the testimony of Claimant.

Claimant admitted he had never thereafter made any complaints to any of his employers about any injury allegedly caused by the accident in January 2006. Claimant continued to drive for the employer, driving every scheduled day throughout the rest of 2006 (see Employer's Exhibit 4) until he quit his job a day or two before Christmas 2006.

Claimant testified he had planned to move to Pennsylvania once his child support payments had ended in December 2006 because his father had a house he could use rent-free. Claimant and his friends packed a U-Haul truck the day after he quit and claimant himself drove to Pennsylvania over the next two days – involving 18 hours of driving, arriving on Christmas day. Claimant admitted that when Earl Guest called him while they were packing to inquire why the claimant had quit, Claimant offered no mention of accident, injury or neck complaints.

The balance of Claimant's testimony dealt with medical care he had received through the State of Pennsylvania, a program called Access Plus, that Claimant said provided free medical care. Claimant testified he had received no medical bills during all his medical care in Pennsylvania.

Claimant asserted he had told Wayne Taylor the next morning that he was stiff and tight and that Wayne told him he would get better. Claimant alleged he again complained to Mr. Taylor about a week later about being stiff and that he probably mentioned his neck.

Mr. Taylor denied any such neck complaints were made to him the day after the accident or a week later, and specifically denied any neck complaints were made to him, ever. In fact, Mr. Taylor said he himself approached Claimant roughly a week after the accident to inquire into Claimant's health, and Claimant simply lifted his left arm to shoulder level, said it was a little stiff, but that he would be okay. This same gesture – lifting of the arm to shoulder level – was how Claimant had communicated his arm stiffness on the day after the accident, in proclaiming his ability to drive – according to Mr. Taylor. Mr. Taylor was much more credible in his detail of these two “conversations” to the effect that Claimant had made no mention of his neck, no complaints about his neck, no physical reports about his neck at any time

Mr. Taylor further testified he had weekly – if not more – contact with Claimant throughout Claimant's employment and that Claimant never had complained about his neck or head. Not during the periodic safety meetings – the last of which for Claimant was within the last week of his employment – did Claimant make any neck complaints to Mr. Taylor.

The testimony of Earl Guest, the other CMT boss who participated in this trial, was similar to that of Mr. Taylor. At no time, ever, did Claimant complain of neck pain to Mr. Guest. Even when Mr. Guest called Claimant at home the day after Claimant had quit to ask “why,” Claimant did not bring up any on-the-job injuries, made no complaints about his neck, or any other body part, did not mention any desire for medical care, but simply said he was “out of here.”

### **C. Medical Opinions**

Dr. MacMillan stated in his report (Employer's Exhibit 1) that Claimant had multi-level cervical degenerative disc disease, as shown by x-rays and the MRI from February 2007. Dr. MacMillan noted that this neck MRI had revealed a right-sided disc protrusion at C4-5 and a disc osteophyte complex at C5-7 and C6-7. Dr. MacMillan noted there were no complaints of neck pain or right-sided arm or shoulder pain on the date of the accident to Dr. Steelman, only a complaint of left arm/shoulder pain, which was inconsistent.

Claimant's attorney had deposed Dr. MacMillan in February 2011, Claimant's Exhibit L. At page 14, Dr. MacMillan discussed the neck MRI from February 2007 and the absence of right-sided symptoms in light of the C4-5 right-sided disc herniation:

“If one is assuming that he had a neck injury, the only finding on the MRI report that might be consistent with an injury would be a disc herniation. The degenerative changes at C5-7 and C6-7 are age-related, longstanding degenerative changes and would not be injury-related. So, if somebody is trying to make the point that he sustained a disc herniation as a result of this accident, then my point is that he should have right-sided symptoms consistent with a right-sided disc herniation but his symptoms at the time of injury were left-sided. So that would tend to discount a disc herniation as having occurred with the accident and would tend to discount the disc herniation as a source of his symptoms. “

(Exhibit L, page 14, lines 3-18.)

Dr. MacMillan further testified about the MRI findings in February 2007 compared to the lack of treatment and complaints throughout 2006:

“He’s got a whole bunch of stuff going on in his MRI report, but there is nothing – everything on the report is generally a degenerative condition, it’s not an injury-related condition. The only thing on the report that could possibly be construed as being the result of an accident of injury is the disc herniation. If the disc herniation were the source of his symptoms, then he should have some right-sided symptoms. And so all I am saying is that the absence of right-sided symptoms would discount the C4-5 disc herniation as being the cause of his injury-related discomfort and would also suggest that the disc herniation is not the result of the alleged injury.”

(Exhibit L, page 21, lines 15 – page 22, lines 5.)

In multiple answers, Dr. MacMillan noted that Claimant’s neck problems, as shown on the MRI, were age-related degeneration and not traumatically from the truck event of January 24, 2006. See, e.g., Exhibit L, page 42, lines 15-23, where the doctor noted “all of the findings on the MRI are more likely age-related than injury-related,” page 46, lines 20 – page 47, line 2, where the doctor stated the findings on the MRI are not related to the truck accident.

As Dr. MacMillan explained:

“You can have radicular symptoms that occur over time typically associated with the degenerative condition, but radicular symptoms that result as an acute injury are immediate.”

(See Exhibit L, page 39, lines 8-12.)

It was Dr. MacMillan’s opinion that the osteophytes – spurs – shown in the neck MRI of February 20, 2007, had developed over decades (Exhibit L, page 70, lines 4-13) and were part of the “age-related degeneration” (Exhibit L, page 68, lines 3-5).

The lack of contemporaneous medical care (as admitted by Claimant) throughout the year after the accident of January 2006 undermines Claimant’s story of constant neck pain. Claimant’s ability to drive the construction vehicle on a daily basis, missing no time from CMT work that entire year also undermines Claimant’s allegations. Claimant’s failure to address the issue of injury and medical care after he quit, and when he was contacted by phone by Earl Guest as Claimant was packing to move away, further removes support for Claimant’s story and for his “excuse” of fear for losing his job if he complained. At that point, Claimant had no job to lose, he had already quit, and there was no reason for him not to request medical care.

#### **D. Vocational Evidence**

The deposition of Mr. Cordray was offered by Claimant over the objection of Employer/Insurer because 1) the deposition was not signed as requested by deponent, and 2) it was not admissible because of lack of evidence the deponent was unavailable to testify live at trial. This Court originally overruled both objections and the signature page of Mr. Cordray has been provided, so Employer's objections to those issues are moot.

Mr. Cordray examined the Claimant and, having been provided medical records as provided by Claimant's counsel, Mr. Cordray indicated he reviewed the medical records provided. Highlighted in his report were some of the pertinent physical restrictions, as suggested by various physicians, and performed his interview of the Claimant. Mr. Cordray testified he, after taking into consideration the physical restrictions as outlined by the various examining doctors, covered with the Claimant his educational and military background, social history and previous medical conditions, which he used to formulate his opinions. Mr. Cordray further testified that the Claimant explained to him what he believed to be the mechanism of injury from his work-related accident. Mr. Cordray testified, in taking into consideration what the Claimant believed happened to him and the parts of his body injured in the accident, coupling this information with the information previously provided, formed his opinion as to whether the Claimant was employable or not. Mr. Cordray noted the Claimant was on a number of prescription medications which would affect his ability to remain alert, attentive and to be able to drive a motor vehicle. Mr. Cordray noted what Mr. O'Connor believes to be his physical limitations and outlined those in his report. Mr. Cordray further solicited from the Claimant the activities of a normal day and performed his vocational testing.

The culmination of all the above mentioned, Mr. Cordray was of the opinion the Claimant was unemployable in the open labor market. Part of the consideration of Mr. Cordray was the number and doses of the various narcotics to which the Claimant indicated he takes on a daily basis. Mr. Cordray was unable to form an opinion as to why the Claimant was on particular medications regarding medical history, only noting that the Claimant testified he was, in fact, on said narcotics. The cross-examination, which was contentious between Mr. Cordray and counsel, boarding on unprofessional in its' vulgarity, wherein Mr. Cordray was asked why he could not come to an opinion on the causal connection on the claimed mechanism of injury and the need for narcotics. Mr. Cordray remained adamant that he noted which narcotics the Claimant had been prescribed and how much he was taking and the effects which were the result of those narcotics, without attributing these to work-related injuries or preexisting or subsequent conditions.

Mr. Cordray ultimately concluded that prior to the Claimant's claimed work-related injury, he was able to engage in rather vigorous physical activity and worked in the labor market and after his claimed work accident and subsequent treatment and medical problems which have arisen since then, whether related or not, the Claimant is currently unemployable. Mr. Cordray formed that conclusion based at least in part on the number of narcotic medications the Claimant is taking. Mr. Cordray noted that at least one physician believed the Claimant employable in a sedentary type work environment, which

Mr. Cordray disagreed with based upon the stated complaints of the Claimant himself, the work restrictions and the persistent narcotic use currently being taken by the Claimant.

### **E. Permanent Injury and Medical Causation**

This Court now turns its attention to the issue of permanent injury medically caused by accident. Claimant asserts his three-level neck fusion in 2009 was medically necessitated by his 2006 accident; Employer/Insurer dispute any such medical causation. Claimant relies on the medical opinions of Dr. Stuckmeyer for support; Employer/Insurer relies on the medical opinions of Dr. MacMillan. Neither physician provided medical treatment; both simply conducted examinations, viewed records, and provided opinions.

Claimant has the burden to prove all elements of his Claim before he is entitled to compensation. (See, e.g., Boyles v. USA Rebar System, Inc., 27 S.W. 3d 418 (W.D. 2000), *Rehearing/Transfer denied*. Generally, in areas outside the common experience of the trier of fact, “expert” opinions are allowed to assist the trier of fact, and it is within the discretion of the Administrative Law Judge (or later, the Labor and Industrial Relations Commission) to determine the weight of such evidence and the credibility of such witnesses. (See, Gausling v. United Industries, 998 S.W. 2d 133 (E.D. 1999), *Overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W. 3d 220, 226 (Mo. Banc 2003). When the opinions of medical experts are in conflict, it is within the province of the fact-finding body to determine whose opinion is the most credible. Gordon v. City of Ellisville, 268 S.W. 3d 454, 460 (E.D. 2008).

This Court has already addressed certain aspects of the testimony of Employer/Insurer’s medical witness, Dr. MacMillan, regarding his report and its submission (Employer’s Exhibit 1) and through his deposition testimony (Claimant’s Exhibit L). It is clear that Dr. MacMillan’s opinions are that the accident of January 24, 2006 did not cause any trauma or injury to Claimant’s neck, that all of Claimant’s neck problems were pre-existing degenerative conditions that continued to degenerate “24/7” until they reached the level necessitating surgery more than three years after the truck accident. Dr. MacMillan agreed that Claimant’s only complaint on the date of accident to the occupational doctor was a sore left shoulder/arm.

The medical expert on behalf of Claimant was Dr. Stuckmeyer, who wrote reports July 31, 2007 (Exhibit D) and July 7, 2010 (Exhibit E). Dr. Stuckmeyer referred to MRI exam and x-rays showing degenerative problems and summarized the Pennsylvania care up to the date of his 2007 report. Then Dr. Stuckmeyer concluded that Claimant has “...sustained an injury” to his neck and left upper extremity (without specificity), that the doctor would not recommend surgery but instead facet injections and expressed an opinion of 20% permanent partial disability to the neck.

The second rating report of Dr. Stuckmeyer as of July 7, 2010 was based on an examination May 24 of that year. This exam was after three years of medical care by Pennsylvania physicians, none of whom offered testimony in this case. Dr. Stuckmeyer summarized the care in Pennsylvania from a review of records and commented about

Dr. MacMillan's medical exam of 2007 that several of the Pennsylvania doctors had referred to degenerative disc disease in the neck. (Exhibit E, page 3).

According to Dr. Stuckmeyer, Claimant's lumbar complaints arose in September 2009 for the first time, which is 3 years and 9 months after the accident. None of the Pennsylvania medical records appear to relate any lumbar complaints to the 2006 work accident, and Dr. Stuckmeyer likewise provides no disability or causation opinions connecting any lumbar complaints to the 2006 work accident. The lumbar complaints are therefore irrelevant, not part of this claim, and the Court so holds that it cannot make any award based on unrelated lumbar complaints.

It was Dr. Stuckmeyer's opinion that the neck surgery "...was appropriate and indicated and its necessity related to the accident date and discussion." (See page 7 of the 2010 report.) Dr. Stuckmeyer then gave Claimant 45% permanent partial disability body as a whole, but the doctor did not provide any explanation or clarification in support of that opinion.

The vast majority of Dr. Stuckmeyer's report is simply a recitation/summary of the care by the physicians in Pennsylvania that started more than a year after the accident. As noted above, nothing in this Court's review of the Pennsylvania medical records has assisted this Court in the issue of medical causation. Reviewing Dr. Stuckmeyer's summary of the same records, likewise, adds nothing to this causation issue.

Dr. Stuckmeyer's comments on page 1 – citing Claimant – to the effect that the truck "flipped over" and that Claimant has sustained injury to his left arm and cervical spine are not supported by any other evidence. Claimant's testimony was that the truck slid onto its right side, a one-quarter turn. This is not the same as a vehicle having "flipped over." The only contemporaneous complaint by Claimant in the first 13 months was about his left arm and shoulder, made to Dr. Steelman the day of the accident.

The Claimant has not met the burden of proof and neither of the reports of Dr. Stuckmeyer provide that proof. Without such proof, Claimant cannot persuade this Court that his neck complaints first recorded 13 months later by physicians in Pennsylvania, after Claimant drove daily for the employer between January and December, could be traced to the work accident of January 2006 as the "prevailing cause." There is no basis for this Court to award any medical care reimbursement for the Pennsylvania care which the Claimant testified as having been "free." Further, I find the Claimant has failed to meet his burden of proof that the work injury alleged was the prevailing factor in his need for care.

### **RULINGS OF LAW**

As noted above, Claimant has the burden to prove all elements of his workers' compensation claim before he is entitled to compensation under the law. While the Employer/Insurer have agreed that an accident occurred January 24, 2006 arising out of and in the course of Claimant's employment with Construction Material Trucking, the Employer/Insurer have denied that the accident resulted in neck complaints arising 13

months later. Employer/Insurer agreed that Claimant suffered an injury to his left arm/shoulder – the only body part about which Claimant complained to Dr. Steelman the day of the accident.

I find the reports of Dr. Stuckmeyer (Exhibits D and E) unconvincing on this essential burden of medical causation. The medical records of Claimant's medical care by the Pennsylvania physicians – starting in February 2007 - are not helpful for medical causation that this January 2006 accident may have been the "prevailing cause" of the subsequent neck complaints. This lack of proof by Claimant to establish that his January 2006 accident was the "prevailing cause" for subsequent neck complaints, neck surgery in 2009, and resulting limitations provide no basis to find any neck injury. Dr. MacMillan provided an explanation of pre-existing degenerative disease with spurring in the Claimant's neck (Employer's Exhibit 1). Dr. MacMillan's opinions that the neck complaints asserted by Claimant and all the subsequent care and limitations resulting therefrom were pre-existing degenerative conditions, not related to the January 24, 2006 accident as its "prevailing cause," I find persuasive.

Likewise, without proof of permanent injury with work as the "prevailing factor," this Court cannot and does not have any basis to award any future medical care.

I find the Claimant has met his burden of proof to establish an injury to his left shoulder and award permanent partial disability benefits of 7.5% of the left shoulder at the 232 week level, 17.4 weeks at \$365.08 per week, a total of \$6,352.39.

I find Claimant's attorney, Brianne Niemann, entitled to attorney's fees of 25% of services rendered.

Made by: \_\_\_\_\_  
Mark Siedlik  
*Administrative Law Judge*  
*Division of Workers' Compensation*