

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

Injury No.: 98-159431

Employee: Robert Overstreet  
Employer: Krey Distributing Co.  
Insurer: National Union Fire Insurance Co. c/o AIG  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 4, 2010. The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued May 4, 2010, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 29<sup>th</sup> day of October 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee: Robert Overstreet

Injury No. 98-159431

Dependents: None

Employer: Krey Distributing Co.

Additional Party: Second Injury Fund

Insurer: National Union Fire Insurance Co. c/o AIG

Hearing Date: January 26, 2010

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

Checked by: GCG/ch

### 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: December 21, 1998
5. State location where accident occurred or occupational disease was contracted: St. Charles 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:  
Claimant was loading cases of beverages when he felt a pop in his back.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Body as a whole referable to the lumbar spine.
14. Nature and extent of any permanent disability: 35% of the body as a whole
15. Compensation paid to-date for temporary disability: \$20,658.01
16. Value necessary medical aid paid to date by employer/insurer? \$50,048.95

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- 17. Value necessary medical aid not furnished by employer/insurer? \$1,825.87
- 18. Employee's average weekly wages: \$942.95
- 19. Weekly compensation rate: \$294.73/PPD \$562.67/TTD
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Unpaid medical expenses:	\$ 682.77
3 weeks of temporary total disability	\$ 1,688.01
140 weeks of permanent partial disability from Employer	\$41,262.20

- 22. Second Injury Fund liability: Yes

29.53 weeks of permanent partial disability from Second Injury Fund	\$ 8,703.38
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TOTAL: \$52,336.36

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:

Radford Raines

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Overstreet

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Dependents: None

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: Krey Distributing Co.

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

Additional Party Second Injury Fund

Insurer: National Union Fire Insurance Co. c/o AIG

Checked by: GCG/ch

### PRELIMINARY STATEMENT

Hearing on the above-referenced case was held before the undersigned Administrative Law Judge on January 26, 2010 at the Division of Workers' Compensation in St. Charles, Missouri. Robert Overstreet (Claimant) was present, and represented by Radford Raines. Peter Maher represented Krey Distributing (Employer) and National Union Fire Insurance Co. of Pittsburgh, c/o AIG Domestic Claims, Inc. (Insurer). Assistant Attorney General Caroline Bean represented the Second Injury Fund. The parties submitted post-trial briefs.

The parties entered into the following Stipulations:

1. Claimant was an employee of Employer, had an average weekly wage of \$942.95 that qualified Claimant for permanent partial disability (PPD) benefits at the rate of \$294.73 per week and temporary total disability (TTD) benefits at the rate of \$562.67.
2. Claimant filed his claim in a timely manner and Employer had received proper notice of Injury.
3. Employer has paid to date \$50,048.95 in medical expenses for care and treatment provided to Claimant.
4. Employer has paid to date \$20,658.01 in temporary total disability (TTD) benefits to Claimant in connection with this claim.
5. Venue is proper in St. Charles County.

The following issues were presented for resolution:

1. Accident.
2. Employer/Insurer liability for past medical expenses in the amount of \$1,825.87.

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3. Employer/Insurer liability for additional TTD benefits.
4. Nature and extent of Claimant's disability.
5. Liability of the Second Injury Fund (SIF).

### **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. Certain exhibits offered into evidence may contain handwritten markings, underlining and/or highlighting on portions of the documents. Any such markings on the exhibits were present at the time they were offered by the parties. Further, any such notes, markings and/or highlights had no impact on any ruling in this case.

The parties offered the following exhibits into evidence:

Claimant offered Exhibits A through H into evidence. Objections were made regarding Exhibits C and H. The objections were sustained, and Exhibits C and H were not received into evidence. Claimant's Exhibits A, B, D, E, F, and G were received into evidence.

Employer/Insurer offered Exhibits 1 and 2 into evidence. An objection to Exhibit 1 was made by Claimant. The objection was sustained in part. Page one of the three page exhibit was received into evidence over the objection, as it was properly certified. The second and third pages were not received into evidence as the objection was sustained as to those pages.

SIF offered Exhibits I and II, which were received into evidence without objection.

Claimant testified on his own behalf at the hearing. Claimant is currently 71 years old. The injury occurred on December 21, 1998. Claimant worked for approximately 30 years as a delivery driver for Employer, and its predecessor MRS Beverages. Claimant testified that the delivery drivers were required to load and unload the trucks. Loading the delivery truck required lifting cases of beer and kegs of beer.

Claimant testified on December 21, 1998 he was injured while loading his truck. He indicated he was holding one or two cases of 16 ounce cans of beer and leaning over to place them when he felt a pop in his back and he felt pain across his lower back and down into his left leg. He finished loading the truck and went to make his first delivery hoping the pain would subside. After he made the first delivery, the pain had increased so he returned to the warehouse and informed Kevin Porter, a supervisor, of the injury. Mr. Porter immediately took Claimant to get medical attention. Claimant received medical treatment at the direction of Employer/Insurer consistent with the records in evidence and which will be summarized in more detail below.

Claimant testified he received an electrical muscle stimulator at the direction of Dr. Bukal Dave for pain management and Insurer refused to pay for it, and although he sent it back he was

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billed for it. His testimony was that he was billed \$1,143.10 for the muscle stimulator, but that he has not made any payments, and does not know if the provider, RS Medical, is actively seeking payment. Claimant also testified that he paid \$682.77 to Walgreens Pharmacy for Neurontin he was taking for pain relief from December 24, 1999 through February 22, 2000.

Claimant testified he previously had bilateral carpal tunnel syndrome. The conditions were work related, and he had surgery on both hands. The settlements for these claims are evidenced by Exhibit G. The right wrist settled for 17.5% PPD and the left wrist settled for 15% PPD. Claimant testifies that after treatment for carpal tunnel, he returned to the same job with no restrictions.

Claimant indicated his current complaints are continuing pain in his back and left leg, numbness in his left leg and foot, and trouble sleeping due to pain. Claimant takes Neurontin and over the counter medications for pain.

Claimant testified on December 3, 1998 he was arrested for DWI. He testified this was approximately 18 days before the work injury. There was a criminal component and a civil license revocation component to the legal proceedings, but that he doesn't remember exactly when he went to court or the outcome of each court appearance.

Claimant testified about his activities during both direct and cross examination. He still owns two parcels of land in Warren County; one is 40 acres and the other 160 acres. Claimant ran a farm on the land, even for a few years after the injury, although he testified he had help. He now just mows the grass there on a riding mower. He is active as a board member of the Gateway Gun Club and has the title of General Manager. He works as an official at trap shooting events, and travels to the Ozarks in this capacity. He also competes in some trap shooting events. Regarding the activity required to be an official, Claimant testified, "They're from 8 in the morning until 5. But you're moving around. You're not in one spot. Take a break, do whatever. No walking. I use a golf cart." Claimant holds a valid real estate broker's license.

Ultimately Claimant was directed to care with Dr. David Raskas. Dr. Raskas reviewed an MRI and ordered a CT myelogram. After reviewing the diagnostic studies Dr. Raskas diagnosed a herniated disc impinging upon the S1 nerve root. Dr. Raskas performed a microdiscectomy at L5-S1. After the surgery, Claimant continued to have leg pain complaints, and some headaches, so another MRI and CT myelogram was ordered. The new studies revealed that there was a spinal fluid leak. Dr. Raskas then performed another surgery on Claimant to repair the spinal fluid leak.

Dr. Raskas imposed the following permanent restrictions: No lifting, pushing, pulling over 30 pounds, no climbing ladders, no repetitive bending, stooping, twisting at the waist, need to change positions from sit to stand, stand to walk, every 30 minutes. He also didn't think Claimant could drive a truck around all day. Dr. Raskas referred Claimant to Dr. Guarino for pain management. Dr. Raskas opined that Claimant was at maximum medical improvement (MMI) from an orthopedic surgical standpoint as of September 13, 1999. On September 13, 1999 Dr. Raskas wrote a letter in which he opined Claimant would be at MMI when "things stabilize in terms of what medications Dr. Guarino wants to keep him on."

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Dr. Raskas opined the injury was acute and causally related to the work injury. Dr. Raskas rated Claimants PPD at 20% of the spine. Dr. Raskas further opined that Claimant could return to employment after healing and reaching MMI. Claimant ultimately was directed to Dr. Bukal Dave for pain management. According to the records received into evidence, the last visit to Dr. Dave for which there is a corresponding record is October 5, 1999.

Dr. Raymond Cohen testified on behalf of Claimant by deposition. Dr. Cohen examined Claimant on December 14, 1999 for the purpose of performing an independent medical exam. Dr. Cohen took a history, performed a medical exam, and reviewed medical records regarding treatment of the primary back injury and the preexisting carpal tunnel syndrome. Dr. Cohen opined Claimants condition was causally related to the work injury of December 21, 1998. Dr. Cohen also diagnosed Claimant with an overuse disorder of the lumbar spine.

Dr. Cohen opined that Claimant suffered PPD of 60% of the body at the lumbar spine as a result of the work injury. He further opined Claimant had preexisting disability to each hand of 25%, relating to the carpal tunnel syndrome and surgical repair. He stated that the preexisting disabilities were a hindrance or obstacle to employment and combine with the primary injury to render a greater overall disability than the simple sum. Dr. Cohen suggested a lifting restriction of 15 pounds.

On January 13, 2000 Dr. Cohen saw Claimant for a supplemental medical rating. At the conclusion of this exam, Dr. Cohen opines Claimant is permanently and totally disabled.

Mr. James Israel, a vocational rehabilitation counselor, testified on behalf of Claimant by deposition on January 26, 2001. Mr. Israel interviewed Claimant, performed vocational testing, and reviewed medical records including the records and reports of Dr. Raskas and Dr. Cohen. Mr. Israel opined Claimant is permanently and totally disabled, and unable to compete in the open labor market. In reaching this conclusion, Mr. Israel adopts the restrictions and the ultimate assessment of permanent total disability provided by Dr. Cohen.

Mr. James England, a vocational rehabilitation counselor, testified on behalf of SIF on March 26, 2002. Mr. England reviewed medical records and reports, the deposition testimony of Claimant, the deposition and report of Mr. Israel, and the deposition of Dr. Cohen. Mr. England opined that even taking into account the more limiting restrictions suggested by Dr. Cohen, there would still be opportunities for employment. Alternately, he opined that if Claimant was functioning so poorly that he was required to lie down a good part of the day, and this is what makes him permanently and totally disabled, then it would be attributable to the last injury alone.

### **FINDINGS OF FACT AND RULINGS OF LAW**

Based on the competent and substantial evidence presented, including the testimony of Claimant, my personal observations, expert medical and vocational testimony, and all other exhibits received into evidence, I find:

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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)). However, the employee must prove the nature and extent of any disability by a reasonable degree of certainty. **Downing v. Willamette Industries, Inc.**, 895 S.W.2d 650, 655 (Mo. App. 1995); **Griggs v. A. B. Chance Company**, 503 S.W.2d 697, 703 (Mo. App. 1974).

## ACCIDENT

Claimant's testimony regarding the injury on December 21, 1998 is credible. Similar accounts are contained in the medical records. The December 21, 1998 record, in the line "1<sup>st</sup> person history" indicates "loading truck with pallets." The records of Dr. Raskas indicate his complaints began "when loading his truck in the morning."

The position argued by Employer is not credible. In summary, Employer asserts Claimant faked the injury because he had been cited for DWI on December 3, 1998 and knew he would lose his drivers' license as a result of the charge. Presumably, Claimant knew both that he would require surgery for his fake injury, and exactly the timetable that his license would be suspended in order for him to schedule the events just right. This theory also presumes Claimant was able to fake the herniated disc at L5-S1, the same injury the Employer selected treating physician opined was an acute injury.

Claimant has met his burden of proof that it is reasonably probable that he suffered an injury in the course and scope of his employment on December 21, 1998.

## PAST MEDICAL

Section 287.140.1 RSMo., provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the workers' injury. Additionally, §287.140.3 RSMo., provides that all medical fees and charges under this section shall be fair and reasonable. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. **Martin v. Mid-America Farm Lines, Inc.**, 769 S.W.2d 105 (Mo.banc 1989).

Claimant's uncontroverted testimony regarding the submitted bills from Walgreen's Pharmacy in the amount of \$682.77 is that these prescriptions were for pain medication related to his work injury. Claimant testified he paid for the cost of the prescriptions himself.

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Employer/Insurer is liable for the cost of these medications, and shall reimburse Claimant for the cost of the prescriptions in the amount of \$682.77.

Claimant has submitted bills from RS Medical regarding a muscle stimulator. Claimant's testimony was that he never used the device and sent it back, nor has he personally made any payments for the muscle stimulator. However, based on the uncontroverted testimony of Claimant, Employer/Insurer is liable for any amount actually billed by RS Medical for said muscle stimulator. However, Employer/Insurer is not obligated to pay this directly to Claimant, as he testified he did not make any payments.

## **TTD**

TTD benefits are intended to cover the employee's healing period from a work-related accident until she can find employment or her condition has reached a level of maximum medical improvement. **Boyles v. USA Rebar Placement, Inc.**, 26 S.W.3d 418, 424 (Mo. App. W.D. 2000). Once further medical progress is no longer expected, a temporary award is no longer warranted. **Id.** Claimant bears the burden of proving her entitlement to TTD benefits by a reasonable probability. **Cooper v. Med. Ctr. of Independence**, 955 S.W.2d 570, 574-75 (Mo. App. W.D. 1997).

Dr. Raskas opined Claimant would be at MMI when "things stabilize in terms of what medications Dr. Guarino wants to keep him on." Claimant actually treated with Dr. Dave for pain management, not Dr. Guarino. Dr. Dave's last treatment record is from October 5, 1999, there is no record which indicates a release from treatment. The parties stipulated that TTD was paid through September 13, 1999.

I find that Claimant reached MMI on October 5, 1999, and has proven that it is reasonably probable that he is entitled to TTD benefits until October 5, 1999. September 14, 1999 to October 5, 1999 is 21 days or 3 weeks. Claimant's TTD rate is \$562.67. Three weeks TTD is \$1,688.01. Employer/Insurer owes Claimant TTD in the amount of \$1,688.01.

## **PERMANENT TOTAL DISABILITY**

Under the Missouri Worker's Compensation Act, "total disability" is defined as the inability to return to any employment. **Messex v. Sachs Elec. Co.**, 989 S.W.2d 206, 210 (Mo.App. E.D. 1999). The words "inability to return to any employment" mean that "the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." **Kowalski v. M-G Metals and Sales, Inc.**, 631 S.W.2d 919, 922 (Mo.App. S.D. 1982). The primary determination for permanent-total disability is whether the claimant is able to compete in the open labor market given her physical condition and situation. See **Messex**, 989 S.W.2d at 210.

Dr. Cohen's opinion regarding permanent total disability is not credible. On December 14, 1999, after performing a physical exam, taking a detailed medical history and reviewing medical records, he opined Claimant was at MMI and that he had a 60% PPD to his low back.

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Then, one month later on January 13, 2000, Dr. Cohen saw Claimant for a “supplemental” medical rating. He did not perform a physical examination nor did he report there were any new tests or data to review. It appears that Dr. Cohen took a slightly more detailed history of entirely self-serving information from Claimant, with no indication that the few additional facts were not available to him at the time of the first evaluation. He then changed his opinion to Claimant being permanently and totally disabled.

Dr. Raskas’ opinion is more credible. Dr. Raskas performed the surgeries to Claimant’s low back, which gave him the opportunity to see the condition of the spine firsthand. The Claimant’s own testimony regarding his activities and tolerances are much more in line with the restrictions recommended by Dr. Raskas as opposed to those recommended by Dr. Cohen.

Concerning the vocational expert opinions, Mr. England’s opinion is more credible than Mr. Israel’s opinion. Mr. Israel’s opinion is largely based on the medical opinion of Dr. Cohen which has been found to not be credible. Further, Mr. England’s opinion corresponds much more closely to the intellectual and activity level to which Claimant testified. For example, Claimant officiates at shooting competitions from 8 am to 5 pm as long as he is given the opportunity to move around and change positions. Claimant has a valid real estate broker’s license. Claimant can act as an advisor to the Gateway Gun Club and even appear at a meeting with the city of Bridgeton on behalf of the Club.

Further, Claimant concedes he would have taken a less physically demanding job with Employer had one been available at the time he completed treatment for the primary injury. Claimant also concedes he took a voluntary retirement and there is no evidence in the record that he ever attempted to look for work of any kind since the December 21, 1998 work injury.

Claimant has failed to present competent and substantial evidence that it is reasonably certain that he is permanently and totally disabled.

## **PERMANENT PARTIAL DISABILITY**

Regarding the condition of, and limitations imposed by the injury to Claimant’s back, the opinions of Dr. Raskas are the most credible. Dr. Raskas is a surgeon, and he actually performed the surgeries, giving him the opportunity to personally view the Claimant’s injuries. Dr. Raskas examines and provides treatment for work injuries, and regularly provides disability evaluations. By contrast, while Dr. Cohen frequently engages in disability examinations and ratings, he is not a surgeon and examined Claimant solely for the purpose of conducting an independent medical exam.

Based on the competent and substantial evidence presented, including the testimony of Claimant, and the medical evidence and testimony, Claimant has sustained a permanent partial disability of 35% of the body as a whole referable to the low back as a direct result of the December 21, 1998 work injury. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. **Banner Iron Works v. Mordis**, 663 S.W.2d 770, 773 (Mo.App. 1983). Employer’s liability for the work injury is therefore \$41,262.20.

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### **SIF LIABILITY**

Claimant has met his burden of proof regarding SIF liability for permanent partial disability. Based on the medical evidence presented and the testimony of Claimant, the pre-existing bilateral wrist injuries and the work injury combine to create a greater disability. Based on the evidence presented, at the time of the primary injury, the preexisting disability was 17.5% of the right wrist and 15% of the left wrist; the synergistic effect or loading factor is 15%. Seventeen and a half percent PPD of the right wrist is 30.625 weeks. Fifteen percent of the left wrist is 26.25 weeks. Thirty-five percent of the body is 140 weeks. The sum is 196.875 weeks, multiplied by 15%, equals 29.53 weeks. Twenty-nine and 53/100 weeks multiplied by the PPD rate of \$294.73 is \$8,703.38. The Second Injury Fund is only responsible for the condition of the wrists at the time of the injury, and not for any post-injury worsening of the wrist conditions. Second Injury Fund liability is therefore \$8,703.38.

Attorney Radford Raines is entitled to a lien in the amount of 25% of all sums recovered as and for attorney fees for necessary legal services provided.

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

This award is dated and attested to this 4<sup>th</sup> day of May, 2010.

/s/ NAOMI PEARSON  
Naomi Pearson  
*Division of Workers' Compensation*