

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

Injury No.: 09-040743

Employee: Timothy R. Parker

Employer: ECOLAB Incorporated/Pest Elimination

Insurer: Insurance Company of the State of Pennsylvania

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 August 6, 2013. The award and decision of Administrative Law Judge Gary L. Robbins, issued August 6, 2013, 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 20th day of February 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Timothy R. Parker Injury No. 09-040743
Dependents: N/A
Employer: ECOLAB Incorporated/Pest Elimination
Additional Party: N/A
Insurer: Insurance Company of the State of Pennsylvania
Appearances: Robert J. Goldson, attorney for the employee.
Steven R. Sharp, attorney for the employer-insurer.
Hearing Date: May 6, 2013 Checked by: GLR/sm

SUMMARY OF FINDINGS

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? March 3, 2009.
5. State location where accident occurred or occupational disease contracted: Cape Girardeau 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 happened or occupational disease contracted: The employee was exposed to chemicals damaging his lungs and caused him to develop occupational asthma.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Lungs and body as a whole.
14. Nature and extent of any permanent disability: 25% permanent partial disability of the body as a whole due to the employee's occupational asthma.
15. Compensation paid to date for temporary total disability: \$20,000.00.
16. Value necessary medical aid paid to date by employer-insurer: \$11,989.24.
17. Value necessary medical aid not furnished by employer-insurer: \$261.00.
18. Employee's average weekly wage: \$576.55.
19. Weekly compensation rate: \$384.39 for all purposes.
20. Method wages computation: By agreement.
21. Amount of compensation payable: \$38,439.00 as Permanent Partial Disability and \$261.00 for payment of a medical bill. See Award.
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: Future Medical. See Award.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the employee 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 employee: Robert J. Goldson.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW

On May 6, 2013, the employee, Timothy R. Parker, appeared in person and with his attorney, Robert J. Goldson, for a hearing for a final award. The employer-insurer was represented at the hearing by their attorney, Steven R. Sharp. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. ECOLAB Incorporated/Pest Elimination was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Insurance Company of the State of Pennsylvania.
2. On March 3, 2009, Timothy R. Parker was an employee of ECOLAB Incorporated/Pest Elimination and was working under the Workers' Compensation Act.
3. On March 3, 2009 the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$576.55, resulting in a compensation rate of \$384.39 for all purposes.
7. The employee's injury was medically causally related to the occupational disease, however the employer-insurer challenges medical causation after September 14, 2010.
8. The employer-insurer paid \$11,989.24 in medical aid.
9. The employer-insurer paid \$20,000.00 in temporary disability benefits.
10. The employee has no claim for mileage.
11. The employee has no claim for temporary total disability.
12. The parties agree that the employee reached maximum medical improvement /MMI as of September 14, 2010.

ISSUES:

1. Previously Incurred Medical Bills
2. Future Medical Care
3. Liability of the Employer-Insurer for Permanent Partial or Permanent Total Disability

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee Exhibits:

- A. Deposition of Timothy G. Lalk.
- B. Deposition of Peter G. Tuteur, M.D.

- C. Deposition of Anthony Kulczycki Jr., M.D.
- D. Records from ECOLAB.
- E. Record re: James Dubois.
- F. Records from Washington University.
- G. Records from Washington University.
- H. Medical records of Gregorio L. Rodriguez, M.D.
- I. Medical records of Musa Wadi, M.D.
- J. Medical records from Cape County Otolaryngology.
- K. Medical records from Southeast Missouri Hospital.
- L. Medical bills.
- M. Deposition of J. Stephen Dolan.
- N. Deposition of Robert M. Bruce, M.D.

Employer-Insurer Exhibits:

1. Deposition of Robert M. Bruce, M.D.
2. Deposition of J. Stephen Dolan.
3. Investigation report.
4. Video.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT:

The employee, Timothy R. Parker, and James Dubois, Craig A. Truedelle and David N. Coffey all personally testified at trial. All other evidence was presented in the form of written records, medical records, video tape records or deposition testimony.

Mr. Parker

The employee is approximately 45 years old and lives in East Prairie with his wife and dependent children. He graduated from high school in 1985. He served in the Army reserves from 1985 and 1994 where he was an armor crewman. He was honorably discharged. He attended the police academy at Southeast Missouri State University and completed the program in 1992. From 1992 to approximately 2003 he served as a police officer in multiple sheriff and police departments.

In 2003 the employee began working for ECOLAB as a service specialist. His job was to spray and treat homes and businesses with pesticides. The employee worked in this capacity until March 3, 2009. He was actually terminated from ECOLAB a year later as he had not physically worked there for about a year.

The employee was exposed to various pesticides and chemicals as a result of his employment. He developed respiratory problems and began a course of medical treatment with multiple doctors and physicians. He was ultimately diagnosed with occupational asthma as a result of his

chemical exposures. He is currently using medications for his respiratory problems and will continue to do so in the future.

The employee reported that he experienced another chemical exposure in 1996 while working as a law enforcement officer.

The employee testified that he wore a respirator when the chemicals he was using called for it. He testified that his supervisor, Jim Dubois, falsified records for the last two years that the employee was working and indicated that he had performed safety check of the employee's respirator when he had not done so.

The employee testified that he actually began to experience breathing problems in 2008. He testified that he is currently taking:

- ProAir, an inhaler
- Singulair
- Advair, twice a day
- Bystolic which deals with blood pressure

The employee testified that with the use of medications his condition has improved since 2009.

He indicated that he keeps an inhaler with him at all times as he does not know what sets off his breathing problems.

The employee testified about some of his activities:

- He and his wife started the Sportsman Club as a place for him to hang out. It is a private club where people can bring alcohol and drink. He testified that he spends two to three hours there two to three times a week.
- He testified that depending on the day he spends 15-16 hours each day in his home.
- He tries to limit his activities outdoors. On an average day he spends 30 minutes to an hour outdoors.
- He attempts to limit the places he goes for worry of a trigger that may bring on an attack.
- On average he goes to Wal-Mart or the grocery store about two times a week.
- He eats out in a restaurant about once a week.
- He takes his family to their vacation property at Kentucky Lake but most of the time he stays in the trailer and watches television while his wife takes the kids to the pool.
- He went to an Oktoberfest and stayed there about 1 to 1 ½ hours.
- He told Mr. Lalk that he would walk, stand, sit and change positions without difficulty. He also testified that he could only walk about 50 yards depending on the day.
- There are days where he can stand for more than 15 minutes.

James Dubois

Mr. Dubois testified that he is a former supervisor of the employee when he worked for ECOLAB. He testified that he tested the employee's respirators. He indicated that he checked

the respirators the first few years he was there but in the last two years he did not do so. He admitted that he falsified a report indicating that he had checked the respirators when he did not.

Dr. Bruce

Dr. Bruce is a medical doctor who is board certified in internal medicine with a specialty in pulmonary diseases. He first saw the employee September 14, 2010 for an independent medical examination. He authored multiple letters/reports and testified by deposition on February 3, 2012.

As of September 14, 2010, the employee's chief complaint was reported as "My breathing is better now that I am on medications". Dr. Bruce took a history from the employee and reported that:

- The employee is 43 years old and is a life-long non-smoker.
- The employee's respiratory health was good until two to three years ago when he developed episodic problems with breathing characterized by a sensation that he could not catch his breath, meaning that he could not get air "in" and cough, which was non-productive. These episodes resolved spontaneously and he did not immediately seek medical attention. He was subsequently told he had allergies and asthma.
- The employee has been on inhaled steroids and short acting bronchodilators and his symptoms are much improved.
- The employee said he could walk 70 to 100 yards on level ground without much difficulty; pushing himself beyond that or going faster he gets a "weight on his chest".
- The employee worked at ECOLAB from 2003 to March 2009 applying pesticides.
- The employee had no problems until mid 2008.
- Since leaving work his symptoms have improved.
- The employee completed two years of college.

On September 14, 2010 Dr. Bruce performed a physical exam and reviewed lab results. He indicated that the pulmonary function studies show a mild reduction in functional residual capacity and noted that a methacholine challenge test was cancelled by the Washington University pulmonary function lab.

As of November 9, 2010, Dr. Bruce had examined additional records including the employee's deposition. He prepared a letter and provided his opinions:

- Based on my examination of Mr. Parker and in review of the above reference material, it is my opinion that he has asthma which may have antedated his employment at ECOLAB.
- The exposure to chemicals during his employment at ECOLAB exacerbated his pulmonary complaints.
- Since leaving that work place and pursuing appropriate therapy for his asthma his symptoms have improved considerably. His chest physical examination is normal as are radiologic studies of his lungs. Standard pulmonary function studies do not show any significant impairment of lung function.

- From a respiratory standpoint, I believe he is capable of employment for such tasks for which he is suitably trained with the understanding that he avoids exposure to conditions that aggravate his asthma.
- He has reached MMI based on his normal pulmonary function studies.
- It is prudent for him to continue with an inhaled corticosteroid. Use of a short acting bronchodilator is appropriate.

Dr. says since the methacholine test was cancelled it is important to get the work sheets from Southeast Missouri Hospital on the methacholine challenge test that was done on June 2, 2009.

As of April 8, 2011, Dr. Bruce advised that:

- He received the methacholine challenge test results done on June 2, 2009. He still wanted other information.
- The new information did not change his prior opinions.

As of October 9, 2011, Dr. Bruce reviewed the results of the methacholine challenge test that was performed on July 28, 2011 by Dr. Tuteur. He reported that:

- The test was valid.
- The prior records of Dr. Kulczycki and Dr. Wadi indicate that that the employee had a diagnosis of asthma prior to the exposure at ECOLAB on or around March 3, 2009.
- It is my opinion that the workplace exposures did exacerbate underlying asthma condition, that he has reached maximum medical improvement as outlined in my prior reports.
- The remainder of my opinions are unchanged.

As of February 1, 2012, Dr. Bruce reviewed the December 1, 2011 report of Dr. Tuteur. Again he stated his opinions:

- It is my opinion that the chemical exposure Mr. Parker reports at ECOLAB could exacerbate his asthma condition.
- The reference cited of Dr. Stuart Brook's article in Chest is not widely accepted in the pulmonary community.
- I am hesitant to attribute causation of Mr. Parker's reactive airways to repeated low dose exposure to multiple chemical agents.
- I do not consider that the employee is disabled from a pulmonary standpoint.
- I believe that he is employable for tasks for which he is suitably trained with the understanding that he avoids contact with situations that trigger his reactive airways. These include sudden exposure to cold air, perfumes, exercise and chemical odors.
- Treatment of reactive airways typically consists of avoidance of triggers and use of inhaled corticosteroids.
- The Advair that the employee was on at the time of the independent medical examination contained a corticosteroid as well as when needed short acting bronchodilator such as Albuterol.
- The duration of these treatments vary from patient to patient. Typically reactive airways takes one of three courses: it may resolve spontaneously, it may resolve with treatment as

indicated above with inhaled steroids with as needed short acting bronchodilators, or it may persist.

- There is no way of predicting the course that Mr. Parker's reactive airways will take.

Dr. Kulczycki

Dr. Kulczycki a medical doctor who is board certified in allergy and immunology. He saw the employee multiple times and testified by deposition on December 1, 2011.

Dr. Kulczycki first saw the employee on May 12, 2010. He took a history and performed a physical. He performed allergy testing.

Dr. Kulczycki reported that the employee's symptoms were airway disease with a component of obstruction. He gave a diagnosis of occupational asthma and to some extent agreed with reactive airway disease as they overlap.

Dr. Kulczycki stated that occupational asthma means that the employee was exposed to something in the course of his occupation that damages his airways, resulting in asthma. He opined that the employee's work in the last three to four years was the substantial factor in the employee's lung disease.

Dr. Kulczycki took a history from the employee about his chemical exposure and stated that the employee's need for medicines was caused by work. He stated that the employee will need medications for the foreseeable future.

Dr. Kulczycki reviewed the testing performed by Dr. Tuteur and indicated that the result of the test was that the employee is extraordinarily reactive to methacholine, and what that means is his airways are generally very reactive. He opined that it appears that employee's workplace exposure caused this.

On cross examination Dr. Kulczycki reported that he did not have specific information of which pesticides the employee was exposed to. He agrees that part of the basis for his medial causation opinion is what the employee told him. In addition his opinion was based on testing which showed that the employee had no allergies that could give him the same problems, and also that he had no history of cigarette smoking. He agreed that he tries to rule out various causes and see what's left.

Dr. Kulczycki also agreed that he was not aware that in 2009 the employee was exposed to chemical fumes while trying to evacuate a building.

Dr. Kulczycki indicated that the employee was somewhat better since when he first saw him, but he still has a very abnormal methacholine challenge and he still has the underlying inflammation. Dr. Kulczycki advised the employee about the things he needs to stay away from.

As of June 10, 2011, the doctor provided an assessment of occupational induced lung disease with components of asthma -- this improved to 94% predicted FEV-I.

Dr. Kulczycki reported that the employee was taking:

- Advair which is a combination of fluticasone and salmeterol
- Albuterol which is ProAir
- Singulair

Dr. Tuteur

Dr. Tuteur is a medical doctor who provided pulmonary consultation. He saw the employee at the request of Dr. Kulczycki. Dr. Tuteur prepared a letter/reports dated December 1, 2011 and testified by deposition on April 2, 2012.

As of December 1, 2011 Dr. Tuteur opined:

- The employee's predominant health problem is chemically induced bronchial reactivity. The employee was not exposed to a single massive fertilizer exposure that can be rigorously timed and dated. He experienced multiple sub-massive exposures throughout his work time after 2003.
- This developed in response to ongoing workplace exposures to pesticides and other materials.
- It is clinically characterized by the development of progressive breathlessness manifested in part by worsening exercise intolerance, as well as recurrent exacerbations in response to regular exposures to a wide variety of ubiquitous nonspecific irritants with additional manifestations of acute followed by prolonged cough, wheezing, burning eyes, and occasional chest tightness.
- There were two methacholine challenge tests done that showed worsening pulmonary function.
- The ongoing prognosis and treatment for this condition requires both continued scheduled dedications and fastidious environmental control to eliminate as much as possible exposure to ever present irritant triggers.
- This condition is permanent and irreversible, though the clinical manifestation may be controlled with this combination of medications and environmental control.
- As such, the employee is totally and permanently disabled from continuing remunerative activity in a workplace in which from time to time he may be exposed to irritant triggers that exacerbate his health status. The deleterious aspect of such recurrent exposures, even if relatively infrequent, is reflected in the increasing likelihood of "airways remodeling" -- a fibro-inflammatory pathologic process involving the airways resulting in permanent and irreversible narrowing and resultant airflow obstruction.
- It very well may be possible, however, that he is able to work in a suitable environment that he controls not only the workplace environment and its potentially associated triggers, but also the transportation to and from such environment, for diesel exhaust, dusts, and fumes may be encountered in such travels.

Mr. Lalk

Mr. Lalk evaluated the employee on December 1, 2010. Lalk reviewed medical records, prepared reports dated January 3, 2011 and February 21, 2012 and testified by deposition on April 10, 2012.

On November 23, 2009 the employee told Dr. Rodriguez that his respirator had never been checked for adequate protection.

On December 22, 2009 Dr. Rodriguez outlined the employee's capabilities:

- Sit for six hours at a time for a total of six hours a day.
- Stand for three hours for a total of three hours in a day.
- Walk for one hour at a time for a total of one hour each day.
- Lift up to 20 pounds but never carry 21 pounds or more.
- Perform occasional bending at the waist.
- Perform occasional reaching above the shoulder and below the waist.
- Perform occasional fingering and handling.
- The duration of the restrictions was unknown.

Mr. Lalk asked the employee about his symptoms or disabilities and reported what he was told by the employee:

- The asthma causes coughing, wheezing and it is hard for him to catch his breath.
- These symptoms sometimes cause him to feel like he is going to pass out.
- The symptoms are triggered by cold weather, when it is in the 40s or below, and by heat when the temperature is 85 degrees or higher, especially when it is humid.
- Exercise can cause symptoms. This exercise can simply be walking, climbing stairs, or playing with his three-year-old child.
- He also needs to avoid chemicals as he can have an episode of asthma symptoms triggered by cleaners, pesticides, insecticides, his wife's perfume, and fumes from the car exhaust in the garage.
- These asthmatic episodes vary in length depending upon how quickly he can get his medication and his level of exposure.
- It usually takes him 10-15 minutes to recover. During this time he needs to sit and relax.
- When he has good control of his activities and exposure to triggers he only has two to three episodes a week.
- The employee is left-handed and has no trouble gripping or fingering items with either hand.
- He is able to move his arms freely and above his head.
- He estimates he can lift 30 pounds without difficulty. He can pick up his 3 year old child. He is not sure if he can lift that amount repetitively.
- When he stands he gets tired after 10-15 minutes. He experiences a feeling of being out of breath. He has not attempted to stand longer than this because of these symptoms.

- He can walk about 50 yards and then he becomes tired and his breathing is labored.
- He can climb up two flights of stairs and then he starts becoming winded.
- He has no problems with his balance
- He can bend at the waist but is unable to bend and lift repetitively.
- He has no difficulty kneeling or squatting.
- He is able to move his head freely or hold it in a fixed position.
- He has no difficulty sitting
- He has no problems with his hearing.
- He is unable to operate a vehicle when he has an attack of asthma.
- In the spring and fall with pollen and changes in temperatures his symptoms increase and occur more frequently.
- He has no allergies he is aware of.
- To control and relieve his symptoms he avoids the triggers that cause his asthma. He stays home frequently.
- He enjoys fishing but found it was too hot this year to go to his trailer on Kentucky Lake.
- He quit the Chamber of Commerce as grilling 100 hamburgers is too physically demanding.
- He doesn't go out to restaurants as much because perfumes and the smells in the restaurant can trigger his asthma.
- He did not go to the Oktoberfest at the lake.

Mr. Lalk reported that the employee told him it was hard to get motivated to prepare for a new career.

Mr. Lalk asked the employee to describe his typical day. The employee stated:

- He goes to bed about 11:00 PM but has difficulty staying asleep if he has an asthma attack. He has been diagnosed with sleep apnea.
- He gets up at 6-6:30 AM. In the past it was his habit to go to breakfast every day and take his wife to lunch.
- He does not really perform any household chores.
- He spends much of his time watching television and stays at home on most days.

Mr. Lalk provided his conclusions and opinions:

- Based on my review of the medical records and the employee's description of his symptoms and limitations, it is my opinion that he would not be able to return to his former occupation as a pest control specialist where he has to work around chemicals and perform prolonged standing and walking.
- He would not be able to return to a position in law enforcement because of his exertional requirements, potential exposure to chemical fumes, and the exposure to temperature extremes.
- He does not have experience or training which would allow him to enter a skilled position at a sedentary or near sedentary level which would be consistent with his physical capabilities.
- At this time he would be limited to unskilled, entry-level positions at this exertional level.

- The types of jobs that he could consider could include customer service representative, information clerk or unarmed security guard, dispatcher, desk clerk in a motel or a rental store and security monitor.
- These jobs are not plentiful in his geographical area. His search for a new job could be extended beyond 12 months.
- Retraining is recommended due to lack of jobs and the fact that they pay only one-half of what he was earning.

As of February 21, 2012, Mr. Lalk had received additional records from Dr. Tuteur and Dr. Kulczycki and amended his findings. He indicated that in his prior report he thought the employee could return an occupation that was different than what he was doing before his injury. Based on this new information my opinion is:

- The employee would not be able to secure and maintain employment in the open labor market based upon his current training and experience.
- The employee does not have the experience which would allow him to engage in employment activities and function entirely from his home.
- My conclusions in the report of January 3, 2011 are reasonable if the opinions of Dr. Rodriguez are considered the guidelines for the employee's level of function.
- My opinion that the employee is not able to maintain employment or compete for a position is more reasonable if one accepts the prognosis and restrictions offered by Dr. Tuteur. These restrictions of Dr. Tuteur appear to be more focused on preventing the employee's position from worsening and causing permanent irreversible narrowing of airways.

Mr. Dolan

Mr. Dolan saw the employee on October 15, 2012. He reviewed medical records which he said appeared to be complete and the employee's deposition. He prepared a report dated October 24, 2012 and November 15, 2012 and testified by deposition on December 10, 2012.

Mr. Dolan reported that:

- The employee is 45 years old.
- The employee has a high school education with two years of college.
- The employee reported that his respirator was not checked regularly and he believes it was not working properly.
- The employee does not see a primary care doctor and is supposed to see Dr. Tuteur and Dr. Kulczycki once a year.
- The employee was taking Advair, Singulair, ProAir, Atrovent, Spiriva, Symbicort and Bystolic. The inhalers have helped the employee considerably.

The employee described his limitations to Mr. Dolan:

- "Everything depends on how I feel that day, extreme cold or extreme heat cause problems breathing. Triggers do not cause as bad problems in moderate weather".
- He had no problems sitting.
- As to standing he said he feels worn out, and has trouble breathing after 15 minutes.

- He said he can only walk about 50 yards. He had to pace himself to walk into this building. He said walking uphill is harder.
- He can bend at the waist but not repetitively.
- He can stoop but not repetitively.
- He can crouch for awhile but then loses his breath.
- He avoids stairs. If he has to go up or down stairs, he goes two or three steps and then rests.
- He is not sure if he can kneel or not.
- He finds crawling exhausting but does crawl as his 5 year old likes to ride him like a horse.
- He has no trouble lifting, but not repetitively.
- He has no trouble carrying, but not for a long distance.
- As to balance he is sometimes lightheaded because of his breathing.
- He has no trouble pushing or pulling as long as it is not repetitive.
- He has no trouble using his hands or fingers.
- He can reach out with his hands overhead as long as he does not do it repetitively.
- He has no trouble talking or hearing.
- He has several asthma attacks a week. He said “when he has an attack he uses an inhaler, and is then exhausted and done for the day”.

The employee also described his daily activities:

- He said they seldom cook at this house. They usually order food to be delivered.
- His wife usually does the grocery shopping. Sometimes he goes. He said he goes at night where there are fewer people in the store.
- He has trouble sleeping, tosses and turns because of anxiety. Three or four times a week he wakes up because he is short of breath. He gets up at 6 or 6:30 AM.
- His normal daily schedule is to watch Fox News, then go outside to water the outside flowers. Sometimes he feeds the outside dog. Frequently his daughter does that. He said that he is in the recliner much of the remainder of the day.
- They sometimes go out to eat. They try to go when the restaurant is not crowded.
- He still goes duck hunting and deer hunting and fishing.
- He says his biggest problem is that “I just don’t have the air to exert”.

The employee reported that he has not looked for a job as “I know I can never work again”.

Some of the conclusions that were made by Mr. Dolan are:

- Dr. Tuteur indicated in his deposition that Mr. Parker would need a home based job, because he would be exposed to irritants getting to and from work and in the work place. Mr. Parker’s own recitation of his activities seems to belie that. He goes hunting, he goes to restaurants, he drives long distances alone, he grills, etc.
- There is a conflict in the information Mr. Parker gave me. He said at one point that he does not have serious problems except in extreme weather, exposed to hot or cold. When talking about limitations, however, he said he has several bad asthma attacks a week that cause him to be worn out and done for the day.

- Mr. Parker cannot work as a police officer or as a pest control technician.
- Mr. Parker now needs an inside job, in an air controlled environment that is air conditioned in hot weather and heated in cold weather, which does not involve physical exertion and where he is not exposed to perfume, cologne, and other strong scents.
- Mr. Parker has acquired skills that would transfer to inside, air controlled jobs. Specifically he could work as a police dispatcher or 911 operator. According to the U.S. Department of Labor there are 360 such jobs in Southeast Missouri.
- With a few weeks of training in computer use Mr. Parker would be able to apply for many types of inside office jobs.
- Currently he is not trying to get a job that meets his restrictions, and he has not tried.

As of November 15, 2012, Mr. Dolan was provided and reviewed the narrative and video reports of Mr. Truedelle and Mr. Coffey. Mr. Dolan reported that:

- The narrative indicates that Mr. Parker was moving about the community where he lives and around the community where his vacation property is located without any obvious regard or concern about pulmonary problems.
- The information indicated that Mr. Parker and his wife own a bar which is a private hunters' club. Mr. Parker did not tell me about owning and evidently helping operate a bar or club when I interviewed him.
- The information certainly suggests that Mr. Parker's pulmonary limitations are not as severe as Dr. Tuteur has suggested and seems to suggest that he does not need a clean air place of employment, based on the activities reported by the surveillance investigators.

Surveillance Video and reports/Craig A. Truedelle and David N. Coffey

The videos and the written report provided by the investigators cover a period beginning September 29, 2012 and ending on October 7, 2012 which is a period of approximately one week. The reports and the video document the date and the time of the day that the employee was observed conducting various activities.

The surveillance information shows the employee traveling from his residence in East Prairie, Missouri to various business establishments in East Prairie and other Missouri cities including Charleston, Sikeston, Bloomsdale, Cape Girardeau and Webster Groves in the St. Louis area. In addition the employee is observed with his family at their vacation residence near Kentucky Lake and in other Kentucky and Tennessee cities. The employee is observed entering businesses to shop, restaurants to eat, gas stations to gas his vehicle and attending an outside fair in Kentucky. The report also indicated that during the surveillance week the employee spent a lot of time at his MT Sportsman Club.

Mr. Truedelle testified that:

- When he surveilled the employee as the MT Sportsman Club, he was there about 5 1/2 hours each day.
- When he surveilled the employee in Kentucky he was standing a lot of the day. When he was at the fair he walked up and down the five or six vendors' stalls that were about 30 yards long as well as to and from his vehicle which was a distance of about 300 yards.

- The employee was carrying a small dog.
- The employee was around people that were smoking.
- His surveillance was generally from about ten yards away.
- The employee never gave any indications of breathing problems.

RULINGS OF LAW:

Previously Incurred Medical Bills

The evidence clearly supports the employee's position that he is entitled to reimbursement for \$261.00 in medical bills. It is apparent that the treatment in question related to the employee's claim for occupational asthma. In addition the employer-insurer concedes that they are responsible for payment of that medical bill.

The employer-insurer is ordered to pay the employee \$261.00 for the bill that is depicted in Employee Exhibit L.

Future Medical Treatment

The evidence presented by the employee and the employer-insurer has shown that the employee requires future medical care to cure and relieve the effects of his work injury. Dr. Bruce, Dr. Tuteur, and Dr. Kulczykcki all agree that medication for the employee's occupational asthma is required for the reasonably foreseeable future and may need to be increased over time. Dr. Kulczykcki has prescribed several medications that the employee continues to use on a daily basis.

Based on a consideration of all of the evidence, the Court finds that the employee's need for future medical care flows from the accident and there is a reasonable probability that it will be needed in the future. The employer-insurer is directed to provide such medical care, including prescriptions that are designed to cure and relieve the employee from the effects of his occupational asthma.

Liability of the Employer-insurer for Permanent Partial or Permanent Total Disability

The primary issue in dispute is whether the employee is permanently and totally disabled as a result of his March 3, 2009 chemical exposure.

Significant evidence has been presented which contradicts statements made by the employee and brings his true physical condition into question. The employee made statements at trial and made statements to Mr. Lalk and Mr. Dolan as to his physical condition and disabilities. These various statements, just to name a few, contradict how long he can stand and walk, how long he spends outdoors, how long he spends indoors during the day mostly in his recliner, the steps he takes to avoid triggers and how long it takes to recover from an attack.

The employee's contention that he is permanently and totally disabled is further undermined by the surveillance evidence. According to the experts the employee has occupational asthma that can be triggered by exposure to unknown irritants. The recommendations are that the employee use his medications and take precautionary steps and avoid any places where he is likely to encounter triggers. In essence this is everywhere as triggers can be of a known or unknown quality. The employee was observed outside standing and walking on multiple days while attending an Oktoberfest and shopping at various retail businesses. Mr. Truedelle testified that on October 6, 2012 the employee spent much of the afternoon outside and observed him walking an estimated 800 to 1000 yards. He also was in contact with smokers.

While the surveillance was generally conducted over a one week period of time, what it reported was in contradiction to the information that the employee provided to evaluators and that he testified to at trial. The surveillance information shows that the employee is moving about in his vehicle traveling from retail business to retail business. This certainly disputes the employee's statement that he can only walk to get the milk or only walk a few yards. The surveillance investigation does not depict a person who has asthma so bad that he must remain confined for fear of exposure and an asthma attack. It does not depict a person who stays in their home for 15-16 hours a day for fear of being exposed to a trigger, and it certainly does not appear to depict a person whose normal daily schedule is to watch Fox News, then go outside to water the outside flowers or feed the dog and then is in a recliner much of the remainder of the day.

The Court found that the surveillance information was probative in that it disputed the employee's statements regarding his condition and how his chemical exposure affected him. The surveillance evidence significantly undermines the employee's description of his symptoms, his level of functioning, and his ability and willingness to actively engage the public despite his diagnosed asthma condition. The surveillance evidence clearly indicated that the employee is able to do much more than he has claimed and that he is not as limited as he claimed.

Both Mr. Lalk and Mr. Dolan indicated that the employee lacked motivation to seek employment in new fields at this point in his life or to seek additional education and training. As the employee said it is hard to get motivated to prepare for a new career and I know I can never work again.

The experts had various opinions regarding the employee's employability or disabilities. Early on Dr. Rodriguez outlined the employee's capabilities. Depending on the limitations that they adopted, the experts had differing opinions on permanent total disability. Dr. Bruce and Mr. Dolan said that the employee was employable with his restrictions. Dr. Tuteur indicated that the employee was permanently and totally disabled but he also said that the employee could work in a sedentary position in a suitable environment. Mr. Lalk indicated that his opinion that the employee is not able to maintain employment or compete for a position is predicated on accepting the prognosis and restrictions offered by Dr. Tuteur. However, Mr. Lalk also reported that Dr. Tuteur's restrictions were more focused on preventing the employee's position from worsening. As the Court has pointed out, the evidence documents that the employee is actually functioning as if he had little restrictions; certainly he is functioning at a greater level than he

claims. The employee contends that he is unemployable because he cannot be exposed in public to asthma triggers. Despite this contention the evidence shows that he can be quite active in public settings.

Based on a consideration of all of the evidence, the Court finds that the employee has not met his burden of proof on the issue of permanent total disability as he has not presented convincing and credible evidence that he is permanently and totally disabled. The employee has not presented convincing and credible evidence that he is unemployable in the open labor market.

The employee offered the testimony and opinions of Dr. Tuteur, Dr. Kulczycki and Mr. Lalk to support his position that he is permanently and totally disabled. The employer-insurer offered the testimony of Dr. Bruce and Mr. Dolan in support of their position that the employee is not permanently and totally disabled as a result of his March 3, 2009 accident.

The Court finds the combined testimony and opinions of Dr. Bruce and Mr. Dolan to be more persuasive than the testimony and opinions of Dr. Tuteur, Dr. Kulczycki and Mr. Lalk. The activity and functioning level demonstrated by the employee supports opinions of employability as opposed to permanent total disability.

While the Court had denied the employee's claim for permanent total disability, he certainly has presented credible and persuasive evidence that he has incurred permanent partial disabilities as a result of his March 3, 2009 exposure. The evidence is credible and convincing that the employee suffers from work-related occupational asthma.

Based on a consideration of all of the evidence, the Court finds that the employee has a 25% permanent partial disability of the body as a whole as a result of his work accident of March 3, 2009.

Based on the Court's finding, the Court orders the employer-insurer to pay to the employee \$38,439.00 as permanent partial disability compensation.

ATTORNEY'S FEE:

Robert J. Goldson, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Employee: Timothy R. Parker

Injury No. 09-040743

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation