

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

Injury No.: 04-100363

Employee: Vincent Pebworth

Employer: Green Horizons Garden Center

Insurer: Continental Western Insurance Company

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 September 22, 2010. The award and decision of Administrative Law Judge Hannelore D. Fischer, issued September 22, 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 27th day of April 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Vincent Pebworth

Injury No. 04-100363

Dependents: N/A

Employer: Green Horizons Garden Center

Additional Party: N/A

Insurer: Continental Western Insurance Company

Hearing Date: June 29, 2010, and July 12, 2010

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

Checked by: HDF/tmt

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: September 27, 2004.
5. State location where accident occurred or occupational disease was contracted: Cole 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:
See award.
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: Low back.
14. Nature and extent of any permanent disability: Permanent and total disability.
15. Compensation paid to-date for temporary disability: \$8,525.54.
16. Value necessary medical aid paid to date by employer/insurer? \$34,508.59.
17. Value necessary medical aid not furnished by employer/insurer? \$122,059.15.
18. Employee's average weekly wages: \$442.60.

Employee: Vincent Pebworth

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19. Weekly compensation rate: \$295.08.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: Permanent total disability as of March 7, 2006.
22. Second Injury Fund liability: \$0.
23. Future requirements awarded: Permanent and total disability.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Andrew Lyskowski

Employee: Vincent Pebworth

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Vincent Pebworth

Injury No: 04-100363

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Green Horizons Garden Center

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

Additional Party: N/A

Insurer: Continental Western Insurance Company

Checked by: HDF/tmt

ISSUES DECIDED

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on June 29, 2010, and July 12, 2010. Memoranda were submitted by July 15, 2010.

The parties stipulated that on or about the 27th of September, 2004, the claimant, Vincent Pebworth, was in the employment of Green Horizons Garden Center (Green Horizons); the claimant sustained an injury by accident and the accident arose out of and in the course of employment. The employer was operating under the provisions of Missouri's workers' compensation law and workers' compensation liability was insured by Continental Western Insurance Company. The employer had timely notice of the injury; a claim for compensation was timely filed.

The claimant's average weekly wage was \$442.60; the appropriate compensation rate is \$295.08 per week for all benefits. Temporary disability benefits have been paid in the amount of \$8,525.54, representing benefits paid between October 13, 2004, through April 12, 2005. Medical aid has been provided in the amount of \$34,508.59.

The issues to be resolved by hearing include 1) the causation of the low back injury requiring treatment in 2006, 2) the nature and extent of permanent disability (permanent total disability is alleged), and 3) the liability of the employer/insurer for medical expenses incurred in the amount of \$122,059.15.

FACTS

The claimant, Vincent Pebworth, was injured on September 27, 2004, when the back wheels of the bobcat he was operating dropped about six inches to a foot causing the bobcat to bounce and Mr. Pebworth to have low back pain right above his belt line. Mr. Pebworth reported his injury to his supervisor who asked Mr. Pebworth to wait 10 to 15 minutes. Mr. Pebworth helped load some Japanese maple trees into a truck bed and while doing so felt a sharp pain in his leg. Mr. Pebworth was then authorized by his supervisor to seek medical treatment. Mr. Pebworth saw Dr. Pearson who ordered an MRI, which revealed a herniated disc at L4-5. Mr. Pebworth was

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then sent to Dr. Heim, a neurosurgeon, who operated on Mr. Pebworth on October 14, 2004, performing a laminectomy and discectomy at the L4-5 level, and then again on December 30, 2004, for a reherniation at the L4-5 level. When Mr. Pebworth continued to have low back pain, another MRI was scheduled which revealed another reherniation at L4-5; at that time, February 11, 2005, Dr. Heim advised that Mr. Pebworth might need a discectomy and fusion at the L4-5 level. Mr. Pebworth was referred to Dr. Graham for pain management. An FCE was performed, which indicated that Mr. Pebworth was able to function at a sedentary level only; Dr. Heim determined that Mr. Pebworth would not be able to return to his work at Green Horizons. Mr. Pebworth applied for and received unemployment benefits. Medical records from Lake Regional Health and Westlake Medical Center indicate that Mr. Pebworth was seen for low back complaints in July of 2005.

When Mr. Pebworth contacted his boss at Green Horizons about returning to work there, he was told that he needed a release to return to work because Green Horizons had a new workers' compensation insurance company. Mr. Pebworth talked to Dr. Heim on the telephone and told Dr. Heim that he was feeling good, but that he had not been working. Dr. Heim gave Mr. Pebworth a full release to return to work at Green Horizons in January of 2006. Mr. Pebworth returned to work at Green Horizons in January of 2006, to the same job he had left after his 2004 accident and injury. On March 6, 2006, Mr. Pebworth was at work for Green Horizons moving boulders with a bobcat; apparently, driving conditions were wet and the bobcat was sliding. Toward the end of the workday, Mr. Pebworth experienced low back pain right above his beltline and in his right leg, just as he had after his September 27, 2004, accident and injury. Mr. Pebworth attempted to report his injury the next morning, but was not able to reach his supervisor at 5:30 am. Mr. Pebworth then went to the emergency room at Lake Regional Hospital where he was given injections for pain along with a prescription for pain medication. Mr. Pebworth's injury was apparently rejected as a new work injury by the workers' compensation carrier covering liability for Green Horizons in January of 2006. Mr. Pebworth was restricted from working after March of 2006 and his employment relationship with Green Horizons ended. Mr. Pebworth has not worked since March 6, 2006.

Mr. Pebworth saw his family physician, Dr. Pearson, in June of 2006, complaining of back and leg pain. An MRI reflected a protruding disc at L4-5 with scarring. Dr. Pearson referred Mr. Pebworth to Dr. Wade. Dr. Wade recommended a discogram and a possible fusion or disc replacement. Dr. Cox of the Spine Midwest Center recommended a fusion of Mr. Pebworth's low back in March of 2007. In June of 2008, Mr. Pebworth was seen by Dr. Harbach at St. John's Hospital in Springfield, who recommended surgery for a recurrent disc herniation at L4-5.

Eventually, Mr. Pebworth had two surgeries, a fusion and placement of a titanium cage, at the L4-5 level in September of 2008.

Currently, Mr. Pebworth is limited to walking no more than two blocks before he needs to stop and sit down as the result of back pain; Mr. Pebworth can only sit for 15 minutes before he needs to stand to alleviate the back pain. Mr. Pebworth spends the majority of his day in a recliner, avoiding any activity that requires him to bend. Mr. Pebworth is able to grocery shop for a few items at a time and drives himself to the grocery store. Mr. Pebworth must take frequent breaks, getting out and walking around the car, when he drives longer distances.

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Dr. Frederick McQueary testified by deposition twice that he believed that it was the September 2004 accident and injury that Mr. Pebworth sustained while employed at Green Horizons that was the substantial factor as well as the prevailing factor in causing Mr. Pebworth's need for additional surgeries in 2008. Dr. McQueary stated that a disc reherniation such as that sustained by Mr. Pebworth does not necessarily involve a new injury or significant event. Dr. McQueary testified with regard to Mr. Pebworth's inability to work since approximately March of 2006.

Dr. Robert Heim testified by deposition on May 23, 2007, that he initially saw Mr. Pebworth in October of 2004, after his September 27, 2004, accident and injury. Based on his evaluation and review of diagnostic studies, Dr. Heim diagnosed Mr. Pebworth with "symptomatic L4-5 disk herniation that was causing back and bilateral lower extremity symptoms—and---also having some bladder urgency as well." Dr. Heim performed an L4-5 discectomy. When Dr. Heim next saw Mr. Pebworth in November of 2004, Mr. Pebworth had continued symptoms of low back pain with pain radiating into the right leg. By December, according to Dr. Heim, Mr. Pebworth's right leg pain had increased and Dr. Heim was suggesting a second surgery to "address the right-sided disk abnormality." Dr. Heim explained the reherniation as the continued "push" or extrusion of disc material beyond its confines. Dr. Heim performed the second surgery in December of 2004. Dr. Heim saw Mr. Pebworth again in February of 2005, at which time, according to Dr. Heim, Mr. Pebworth's symptoms had increased with the exception of improvement in right buttock pain. A subsequent MRI revealed the extrusion, again, of additional disc material. At that time a fusion was discussed but not accomplished; Dr. Heim was hesitant to perform the fusion, fearing it would not result in improvement in Mr. Pebworth's symptoms. Mr. Pebworth was referred to Dr. Graham for pain management. Dr. Heim saw Mr. Pebworth again in March and April of 2005, when Mr. Pebworth presented with complaints of "pain in the right side of the back with radiation into the right buttock and down the right thigh ...the pain would sometimes go down to his foot and that his foot felt numb." Dr. Heim ascribed a 15 to 20 percent permanent partial disability to Mr. Pebworth's low back injury of September 27, 2004, and after a functional capacity evaluation was performed on Mr. Pebworth, agreed that Mr. Pebworth should be restricted to "sedentary physical demand" work only.

Dr. Bennoch testified by deposition twice, on January 20, 2009, and November 2, 2009. Dr. Bennoch is board certified in pediatrics. Dr. Bennoch evaluated Mr. Pebworth in March of 2008. Dr. Bennoch stated that all four of Mr. Pebworth's surgeries have been at the same level, the L4-5 level, and that any references to the L5-S1 level are inaccurate and caused by Mr. Pebworth's additional, transitional vertebra. Dr. Bennoch opined that if Mr. Pebworth is permanently and totally disabled, "the main injury occurred with the first accident. He was sent back to work. He was still hurting. And then reagravated. So it would be very difficult to say that it was a combination." Dr. Bennoch opined to a 35 percent disability of the body as the result of Mr. Pebworth's low back injury. Dr. Bennoch testified that Mr. Pebworth has been unable to work since March of 2006.

Mr. Eldred, vocational rehabilitation counselor, testified by deposition on June 23, 2010, that he evaluated Mr. Pebworth on September 3, 2009. Mr. Eldred opined that Mr. Pebworth is unemployable and not capable of retraining as the result of the restrictions imposed on him because of the condition of his low back. Mr. Eldred stated that he believed Mr. Pebworth to be permanently and totally disabled, either as a result of the combination of the September 2004 and March 2006 injuries or as the result of the September 27, 2004, accident and injury alone.

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Medical bills in the amount of \$122,059.15 have been identified by the claimant as reflecting bills for treatment for his low back complaints related to his September 27, 2004, accident and injury. Moreover, Dr. Bennoch testified with regard to the reasonableness of the charges and their relationship to the underlying treatment provided to Mr. Pebworth.

APPLICABLE LAW

RSMo Section 287.020.2 The word “accident” as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

RSMo Section 287.020.3 (1) In this chapter the term “injury” is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and
- (b) It can be seen to have followed as a natural incident of the work; and
- (c) It can be fairly traced to the employment as a proximate cause; and
- (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life;

(3) The terms “injury” and “personal injuries” shall mean violence to the physical structure of the body and to the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

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AWARD

The claimant, Vincent Pebworth has sustained his burden of proof that the low back injury suffered as the result of his September 27, 2004, accident is compensable under Missouri's workers' compensation law. The low back injury in question is the continuous injury to the L4-5 spine from which Mr. Pebworth has suffered since September 27, 2004, including any aggravation of complaints on or about March 6, 2006. Mr. Pebworth's description of the September 27, 2004, accident and injury, in conjunction with the testimonies of Dr. Heim, Dr. McQueary and Dr. Bennoch all indicate that it was the accident of September 27, 2004, that precipitated Mr. Pebworth's low back injury and need for treatment after 2006. The fact that Mr. Pebworth returned to work for a few weeks driving a bobcat before he sought additional treatment for ongoing low back complaints and that additional treatment was consistent with treatment recommended in 2005, in conjunction with his treatment for his admittedly compensable September 27, 2004, accident does not relieve the employer/insurer of responsibility for Mr. Pebworth's low back injury.

Mr. Pebworth has sustained his burden of proof that he is permanently and totally disabled. Mr. Pebworth testified to his limited physical activities as the result of his back injuries and multiple corrective surgeries; likewise, Dr. McQueary and Dr. Bennoch testified to Mr. Pebworth's physical limitations. Mr. Eldred testified credibly with regard to the lack of employment and training options available to Mr. Pebworth as the result of the limitations imposed by his back.

Finally, the employer/insurer are liable for the medical bills in the amount of \$122,059.15 for the medical treatment for the back injury sustained by Mr. Pebworth.

Date: _____

Made by: _____

HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson