

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

Injury No.: 99-156233

Employee: Gary Purdy  
Employer: Borden, Inc.  
Insurer: Insurance Company of the State of Pennsylvania  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)  
Date of Accident: November 17, 1999  
Place and County of Accident: St. Louis City, Missouri

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 18, 2007. The award and decision of Administrative Law Judge Joseph E. Denigan, issued July 18, 2007, 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 15<sup>th</sup> day of November 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Gary Purdy

Injury No.: 99-156233



TOTAL:

-0-

23. Future requirements awarded: None

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

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

Employee:	Gary Purdy	Injury No.: 99-156233
Dependents:	N/A	Before the
Employer:	Borden, Inc.	<b>Division of Workers'</b>
		<b>Compensation</b>
Additional Party:	Second Injury Fund (Open)	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Insurance Company of the State of Pennsylvania	Checked by: JED

This case involves two separate Claims for Compensation, each for reported low back injury, resulting to Claimant with the reported injury dates of November 17, 1999 ("first case") and November 3, 2000 ("second case"). Separate awards issue in each case.

### Issues

1. Temporary total disability;
2. Permanent Partial disability; and
3. Credit of \$558.52 (second case).

## **FINDINGS OF FACT**

1. The Findings of Fact and Rulings of Law contained in the prior Award, dated August 21, 2002, is adopted

herein and incorporated by reference.

2. Claimant offered the deposition of Dr. Hanaway as Exhibit K in which Claimant elucidated an impressive calendar of forensic examinations and reports (p. 10):

March 20, 2001  
March 28, 2001  
June 20, 2001  
November 27, 2001

**February 28, 2002**

October 16, 2002  
--- two year gap ---  
May 17, 2004  
May 18, 2004  
--- two year gap ---  
January 26, 2006  
September 25, 2006

3. Claimant asserts an off-work period of July 16, 2001 until May 20, 2003 which period is unaccompanied by either authorized or privately elected treatment records. Claimant has continued to work full-time since this claimed period of TTD. No contemporaneous off-work slips are in evidence for this period.

4. Claimant has not undergone any surgery as was suggested by Dr. Hanaway as necessary.

5. Claimant lost no time in the last two years for low back pain; he was pain free at trial.

6. In 2002, Dr. Hanaway assessed 65 percent PPD for low back (unoperated) without attribution between the two cases herein. Rather he made attribution between lumbar disc levels two of which he described as herniated despite less clear radiological opinions from treating physicians. Rejecting Claimant's choice of surgical consult, Dr. Hanaway, who is not a surgeon, insisted Claimant was a surgical candidate and would seek another evaluation by someone else.

7. Dr. Mirkin assigned a 2 percent PPD to the second accident based on his last examination which included negative straight leg raising and negative sensory exam (T. 154). Dr. Mirkin notes his discussion of surgery with Claimant and his recommendation that Claimant maintain the forty pound lifting restriction. Dr. Mirkin explained surgical risks but did not recommend surgery.

8. Claimant's only new evidence at this trial is Exhibit K. No additional treatment records are in evidence.

## **RULINGS OF LAW**

### Temporary Total Disability

Claimant offered no proof of temporary total disability that relates back to the reported injuries. Claimant underwent no authorized treatment after 2001 and presents no medical records or bills or other evidence of private treatment for low back symptoms subsequent to his release by Dr. Mirkin which relate back to the reported injuries. Indeed, Employer's second opinion by Dr. Kennedy, a surgeon, who reiterated the 2000 myelogram as normal for active disc pathology, is evidence that cannot be reconciled with Claimant's excessive complaints at that time. At trial, Claimant was pain free.

Claimant's proffer of a forensic expert over the above calendar period as a basis to prove TTD is specious. The testimony is unsupported by any facts and reasons (perhaps memorialized in a conventional treatment record) that might give the TTD opinions probative value. Claimant's expert must adhere to methods of proof used by experts in the field. Claimant did not present independent evidence of entitlement to TTD benefits after TTD benefits suspended on October 28, 2001. His unaided testimony is not sufficient to prove the underlying complex medical questions which are necessary to determine work related total disability. It is noteworthy that even upon the second accident, Claimant was not temporarily and totally disabled until nine months post-accident. Claimant sought no additional relief from the Division since the prior Awards issued four years ago.

### **Nature & Extent of PPD**

The treatment gap that commences subsequent to Dr. Mirkin's release in 2001 breaks the causal chain but provides a focal point to assess PPD caused by the two reported injuries. In addition, trial at this late date affords the fact finder hindsight that demonstrates the wisdom of the respective experts' opinions. It is evident that having avoided surgery per Employer's expert recommendation in late 2001 (T. 152), Claimant remains free of treatable symptoms, able to work and, again, pain free at trial.

The first two year gap in Claimant's forensic calendar marks the cessation of treatment for Claimant's low back symptoms that are referable to the two reported injuries herein. This gap represents a break in the medical causal chain between the reported events and subsequent years. Claimant's expert testified that the first accident was the "main one for him" and the second accident aggravated [the first injury]. This opinion is contrary to the symptomatology and absence of any lost time or notable treatment following the first accident. Claimant's expert's PPD ratings are completely unsubstantiated in the record, including Claimant's trial testimony. Claimant exhibited no symptoms at trial nor testified that he experienced serious periodic symptoms suggestive of an active disc pathology.

Of the two ratings offered in evidence, Dr. Mirkin's rating for permanent injury, as a basis for payment of PPD benefits, more closely approximates Claimant's ability to avoid surgery, lack of treatment and pain free appearance at trial than does Dr. Hanaway's rating of 65 percent PPD.

### Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have sustained no permanent injury in the first case (1999). No other benefits are awarded.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Joseph E. Denigan  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeffrey W. Buker  
*Acting Director*  
*Division of Workers' Compensation*

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 00-138098

Employee: Gary Purdy

Employer: Borden, Inc.

Insurer: Insurance Company of the State of Pennsylvania

Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)

Date of Accident: November 3, 2000

Place and County of Accident: St. Louis City, Missouri

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 18, 2007. The award and decision of Administrative Law Judge Joseph E. Denigan, issued July 18, 2007, 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 15th day of November 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

SEPARATE OPINION FILED

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

SEPARATE OPINION  
CONCURRING IN PART AND DISSENTING IN PART

I join my fellow commissioners in awarding compensation in this claim. However, after a review of the entire record as a whole, I believe the decision of the administrative law judge should be modified.

The administrative law judge failed to award temporary total disability benefits for the period from June 19, 2001 to May 20, 2003. He also only awarded employee 7½% permanent partial disability to the body as a whole referable to the low back for his November 3, 2000 injury. I believe the award should be modified to increase the award of permanent partial disability as well as award temporary total disability for the above-mentioned period.

*Temporary Total Disability*

Employee is entitled to temporary total disability benefits to cover healing periods to be paid prior to the time when the employee can return to work, his condition stabilizes, or his condition has reached a point of maximum medical progress. *Schuster v. Division of Employment Security*, 972 S.W.2d 377, 381 (Mo.App. E.D. 1998).

Employee has established that he is entitled to temporary total disability benefits for the period of June 19, 2001 through May 20, 2003. Employee testified that his low back condition progressively worsened after his 2000 injury. He testified that the pain was too severe on a daily basis for him to work. Employee testified that his condition, specifically, chronic low back pain prevented him from returning to work until May 20, 2003.

Dr. Hanaway noted in his report dated June 19, 2001 that employee had a torn annulus at a number of different levels as well as herniated discs at L3-4 and L5-S1. Dr. Hanaway also noted that employee was experiencing constant back pain and that his condition was getting progressively worse since his November 3, 2000 injury. Dr. Hanaway opined employee was disabled from work and authorized him to be off work as of June 19, 2001. Dr. Hanaway examined employee on February 28, 2002 and found that employee's condition was made decidedly worse by attempts at back therapy. Dr. Hanaway noted that employee was now experiencing constant low back pain that had increased, right groin pain as well as pain down his right leg. At that time, Dr. Hanaway opined that employee continued to be disabled from work. In October 2002, employee's condition was unchanged and Dr. Hanaway recommended employee seek a surgical consultation on his back. Employee chose to continue to treat his condition conservatively; it was only after undergoing traction therapy at Barnes Care that employee was able to return to work in May of 2003.

### *Permanent Partial Disability*

The extent and percentage of a disability is a finding of fact within the special province of the Commission. *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo.App. W.D. 2000) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.banc 2003)). The Commission may consider all of the evidence, including the employee's testimony, and draw reasonable inferences in arriving at the percentage of disability. *Id.*

I believe the evidence supports that employee is entitled to a greater percentage of disability than awarded by the majority. Employee testified as to his limitations as a result of his back injury as well as to the persistent pain associated with his condition. The administrative law judge focused on the fact that employee testified that at the time of hearing he was not in pain. However, at the time of hearing employee testified that he experienced periodic pain in his lower back that at times was quite substantial. Employee testified that when the pain got excruciating, his back would lock up and get extremely tight which limited his mobility. Employee testified that he experienced pain while working, but was able to work through the pain. Employee testified that he continued to take over the counter pain medications for his low back condition.

Additionally, Dr. Hanaway examined employee and opined that as a result of the injuries to his lower back, employee suffered a permanent partial disability of 65% of the body as a whole. I find Dr. Hanaway's opinion regarding the extent and percentage of disability more persuasive as it more accurately reflects the amount of employee's disability.

### *Conclusion*

Based upon my review of all the evidence, I find employee is entitled to temporary total disability benefits from June 19, 2001 to May 20, 2003. I further find that employee sustained a permanent partial disability of 25% of the body as a whole as a result of his November 3, 2000 injury. I respectfully dissent from the portion of the majority's decision awarding employee permanent partial disability of only 7½% of the body as a whole.

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John J. Hickey, Member

## **AWARD**

Employee: Gary Purdy

Injury No.: 00-138098

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: Borden, Inc.

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

Additional Party: Second Injury Fund (Open)

Insurer: Insurance Company of the State of Pennsylvania

Hearing Date: April 19, 2007

Checked by: JED:tr

**FINDINGS OF FACT AND RULINGS OF LAW**

- 1. Are any benefits awarded herein? Yes
- 3. 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
- 6. Date of accident or onset of occupational disease: November 3, 2000
- 7. State location where accident occurred or occupational disease was contracted: St. Louis City, Mo.
- 6. Was above employee in employ of above Employer at time of alleged accident or occupational disease?
- 7. Did Employer receive proper notice? Yes
- 8. Did accident or occupational disease arise out of and in the course of the employment? Yes
- 10. 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 operating a riding vacuum and struck his chest.
- 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
- 15. Nature and extent of any permanent disability: 7.5% PPD of the body referable to the low back
- 15. Compensation paid to-date for temporary disability: \$2,209.31 (7 weeks lost time)
- 16. Value necessary medical aid paid to date by Employer? \$6,309.32

Employee: Gary Purdy Injury No.: 00-138098

- 17. Value necessary medical aid not furnished by Employer? None
- 19. Employee's average weekly wages: \$393.73/\$314.26
- 19. Weekly compensation rate: \$590.59
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:
  - 30 weeks PPD from Employer \$9,427.80
  - Credit from Advanced Payment (558.52)
- 22. Second Injury Fund liability: No
- TOTAL: \$8,869.28

- 23. Future requirements awarded: None

Said payments to begin N/A 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:

Harry J. Nichols

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

Employee:	Gary Purdy	Injury No.: 00-138098
Dependents:	N/A	Before the <b>Division of Workers'</b> <b>Compensation</b>
Employer:	Borden, Inc.	Department of Labor and Industrial Relations of Missouri
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### Issues

1. Temporary total disability;
2. Permanent Partial disability; and
3. Credit of \$558.52 (stipulated amount) (second case).

### ***FINDINGS OF FACT***

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## **RULINGS OF LAW**

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Claimant's proffer of a forensic expert over the above calendar period as a basis to prove TTD is specious. The testimony is unsupported by any facts and reasons (perhaps memorialized in a conventional treatment record) that might give the TTD opinions probative value. Claimant's expert must adhere to methods of proof used by experts in the field. Claimant did not present independent evidence of entitlement to TTD benefits after TTD benefits suspended on October 28, 2001. His unaided testimony is not sufficient to prove the underlying complex medical questions which are necessary to determine work related total disability. It is noteworthy that even upon the second accident, Claimant was not temporarily and totally disabled until nine months post-accident. Claimant sought no additional relief from the Division since the prior Awards issued four years ago.

### **Nature & Extent of PPD**

The treatment gap that commences subsequent to Dr. Mirkin's release in 2001 breaks the causal chain but provides a focal point to assess PPD caused by the two reported injuries. In addition, trial at this late date affords the fact finder hindsight that demonstrates the wisdom of the respective experts' opinions. It is evident that having avoided surgery per Employer's expert recommendation in late 2001 (T. 152), Claimant remains free of treatable symptoms, able to work and, again, pain free at trial.

The first two year gap in Claimant's forensic calendar marks the cessation of treatment for Claimant's low

back symptoms that are referable to the two reported injuries herein. This gap represents a break in the medical causal chain between the reported events and subsequent years. Claimant's expert testified that the first accident was the "main one for him" and the second accident aggravated [the first injury]. This opinion is contrary to the symptomatology and absence of any lost time or notable treatment following the first accident. Claimant's expert's PPD ratings are completely unsubstantiated in the record, including Claimant's trial testimony. Claimant exhibited no symptoms at trial nor testified that he experienced serious periodic symptoms suggestive of an active disc pathology.

Of the two ratings offered in evidence, Dr. Mirkin's rating for permanent injury, as a basis for payment of PPD benefits, more closely approximates Claimant's ability to avoid surgery, lack of treatment and pain free appearance at trial than does Dr. Hanaway's rating of 65 percent PPD.

#### Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have sustained a seven and one-half percent PPD in the second case (2000). Employer's advance payment was stipulated and the asserted credit was un rebutted.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Joseph E. Denigan  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeffrey W. Buker  
*Acting Director*  
*Division of Workers' Compensation*