

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

Injury No.: 04-101040

Employee: Jason Rector  
Employer: Gary's Heating & Cooling  
Insurer: Federated Mutual Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: September 24, 2004  
Place and County of Accident: Camden County, 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 August 22, 2008. The award and decision of Chief Administrative Law Judge Hannelore D. Fischer, issued August 22, 2008, 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 23rd day of January 2009.

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: Jason Rector

Injury No. 04-101040

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

Dependents: N/A

Employer: Gary's Heating & Cooling

Additional Party:

Insurer: Federated Mutual Insurance

Hearing Date: May 23, 2008

Checked by: HDF:lw

### 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 24, 2004
5. State location where accident occurred or occupational disease was contracted: Camden County
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: Back

- Nature and extent of any permanent disability: 65% of body

15. Compensation paid to-date for temporary disability: \$22920.15
16. Value necessary medical aid paid to date by employer/insurer? \$37,920.99
17. Value necessary medical aid not furnished by employer/insurer? \$3926.64
18. Employee's average weekly wages: \$577.50
19. Weekly compensation rate: \$385.00/\$354.05

- Method wages computation: By Agreement

### COMPENSATION PAYABLE

- Amount of compensation payable: 65% of body = 260 weeks

$$260 \text{ weeks} \times \$354.05 = \$92,053.00$$

**TOTAL: \$92,053.00**

22. Second Injury Fund liability: None

23. Future Requirements Awarded: Future medical benefits awarded.

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 permanent disability hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Timothy McDuffey.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jason Rector

Injury No: 04-101040

Before the  
DIVISION OF WORKERS'

## COMPENSATION

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

Dependents: N/A

Employer: Gary's Heating & Cooling

Additional Party: Second Injury Fund

Insurer: Federated Mutual Insurance

Checked by: HDF:lw

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on May 23, 2008. Memoranda were submitted by June 16, 2008.

The parties stipulated that on or about September 24, 2004, the claimant, Jason Rector, was in the employment of Gary's Heating and Cooling. The claimant sustained an injury by accident which arose out of and in the course of his employment. The employer was operating under the provisions of Missouri's workers' compensation law and liability for workers' compensation was insured by Federated Mutual Insurance Company. The employer had notice of the injury and a claim for compensation was timely filed. The claimants' average weekly wage was \$577.50 per week; the applicable compensation rate is \$385.00 per week for permanent and temporary total disability benefits and \$354.05 per week for permanent partial disability benefits. Temporary disability benefits have been paid to date in the amount of \$22,920.15. Medical aid has been provided in the amount of \$37,920.99.

The issues to be resolved by hearing include 1) the applicability of a credit to the employer/insurer for 21 days of temporary total disability benefits paid for the period of May 25, 2006 through June 14, 2006, a period of 21 days, in the amount of \$1155.00, 2) the liability of the employer/insurer for unpaid medical bills in the amount of \$3926.64, 3) the nature and extent of permanent disability, 4) the liability of the employer/insurer for future medical treatment, and 5) the liability of the Second Injury Fund.

### FINDINGS OF FACTS

The claimant, Jason Rector, was 41 years old as of the date of the hearing. Mr. Rector graduated from a small high school in Camdenton, Missouri, in 1985, and began working thereafter in a variety of jobs, including sales, painting, dry walling and factory work. In 1996, Mr. Rector began his work with Gary's Heating and Cooling where he learned to install heat pumps, furnaces, return air drops, filtration systems, registers, grills, and air conditioners. Mr. Rector was a working supervisor at the time of the 2004 accident, spending 95% of his time working. Mr. Rector would typically handle furnaces weighing between 250 and 383 pounds, carry a toolbox weighing 50 pounds, wear a tool belt weighing 15 to 20 pounds and handle ductwork weighing 25 to 40 pounds.

Prior to September 24, 2004, Mr. Rector testified, he had back complaints for which he saw Dr. Jones. Mr. Rector said that he had been seeing Dr. Jones since prior to 1996 for back pain and received from Dr. Jones instructions in proper lifting techniques, muscle relaxants and pain pills. According to Mr. Rector, his back pain prior to September of 2004 did not affect his ability to work or his ability to engage in outdoor activities. Prior to September 24, 2004, Mr. Rector enjoyed an active life style which included running, golfing, playing paintball, riding a jet ski; these are all activities that he can no longer enjoy as the result of the back pain he attributes to his September 24, 2004 accident.

On September 24, 2004, Mr. Rector was on a ladder 14 feet off of a concrete floor when the ladder slipped, causing Mr. Rector to fall with the ladder, his upper body hitting the concrete floor while his feet stayed on the ladder. Mr. Rector had immediate swelling in his hand and a knot on his elbow. Mr. Rector was seen at the hospital and referred to Dr. Jones. Mr. Rector had pain in his neck and back for which Dr. Jones

prescribed physical therapy. Mr. Rector began taking pain medications daily in order to be able to work. Dr. Jones' records include bills resulting from treatment of the back in the amount of \$998.00 for the period of May 2, 2007, through January 4, 2008.

Mr. Rector described returning to work as a supervisor only after September 24, 2004, no longer carrying air conditioning or heat pump units. Mr. Rector described taking increasingly large amounts of pain medications and muscle relaxants. Between Thanksgiving in 2004 and January of 2005, Mr. Rector had three epidural steroid injections which failed to offer much relief of his back pain. Mr. Rector worked for five months after his September 2004 accident, although the manner in which he worked was altered.

In February of 2005, after drilling a hole in a wall for two days, Mr. Rector's hands became swollen up to his elbows. Mr. Rector last worked for Gary's Heating and Cooling on February 17, 2005. On February 18, 2005, Mr. Rector went to the hospital; apparently herniated discs in the neck and low back were diagnosed. Dr. Jones referred Mr. Rector to Dr. Parker in Columbia, Missouri, for treatment of his herniated discs. Dr. Parker offered only an extensive fusion of Mr. Rector's back which Dr. Parker did not recommend. Dr. Parker referred Mr. Rector to Dr. Jones for his prescription medication although Dr. Parker did prescribe medication for Mr. Rector in Dr. Jones' absence.

For his symptoms in his hands, Mr. Rector was referred by Dr. Parker to Dr. Havey who performed bilateral carpal tunnel release surgeries in August of 2005. The carpal tunnel release surgeries were successful in relieving pain in the thumb, index and middle fingers of both of Mr. Rector's hands, although the last two fingers of each hand are still symptomatic.

Mr. Rector testified that he feels the condition of his neck and back is deteriorating; his pain is at a level six or seven out of ten with pain medications; most of his time, including sleeping, is spent in a recliner and standing is painful.

Mr. Rector received temporary total disability benefits through June 14, 2006, and testified that he has not been returned to work.

On August 22, 2006, the workers' compensation carrier sent Mr. Rector to Dr. Lennard for his continuing low back complaints; Dr. Lennard referred Mr. Rector to Dr. Workman. Both Dr. Workman and Dr. Lennard felt that Mr. Rector was not at maximum medical improvement if further treatment such as nucleoplasty for the low back is an option for him. No viable surgical alternatives have been offered to Mr. Rector for either his neck or low back.

Dr. David Volarich, D.O., testified that he examined Mr. Rector on July 12, 2007. Regarding the September 24, 2004 injury, Dr. Volarich found 1) lumbar syndrome secondary to disc protrusions at L3-4 and L4-5 central and to the right as well as aggravation of degenerative disc disease, with an attendant permanent disability of 22.5 percent of the body, 2) thoracic syndrome, secondary to disc protrusion at T8-9, with an attendant permanent disability of 15 percent of the body, 3) severe myofascial and chronic regional pain syndrome, with an attendant permanent disability of 25 percent of the body, 4) disc bulging at C5-6 and C6-7 as well as aggravation of degenerative cervical disc disease, with an attendant permanent disability of 20 percent of the body.

With regard to preexisting disability, Dr. Volarich opined to a 12.5 percent permanent partial disability of the body referable to the lumbosacral spine. Dr. Volarich seemed to base his opinion on Mr. Rector's requirement of "medical therapy including narcotics on an intermittent basis leading up to 9/24/04."

Dr. Volarich opined that Mr. Rector is in need of ongoing care at a pain clinic and that continued narcotics to control his pain syndrome are appropriate. Dr. Volarich went on to recommend epidural steroid injections, foraminal nerve root blocks, TENS units and similar treatments to control Mr. Rector's severe pain.

While Dr. Volarich had concerns about what he thought was Mr. Rector's depression, Dr. Volarich stated that he would defer analysis as to the cause of Mr. Rector's depression to a psychiatric assessment.

With regard to Mr. Rector's restrictions referable to the spine, Dr. Volarich stated that Mr. Rector would need to lie down during the day, that Mr. Rector is unable to stand for an eight-hour shift or work upright for an eight-hour shift.

With regard to a return to work, Dr. Volarich stated that if vocational assessment could not identify a suitable job, then Mr. Rector is permanently and totally disabled as a result of the work-related injuries of September 24, 2004, and leading up to February 18, 2005, in combination with each other and in combination with his

preexisting lumbar syndrome present prior to lumbar September 24, 2004.

Dr. Volarich acknowledged that a functional capacity exam in which Mr. Rector participated in October of 2005 indicated that Mr. Rector was capable of work in the heavy physical demand category; however, Dr. Volarich opined that this three hour and fifty-four minute examination did not correctly reflect Mr. Rector's ability to work on a daily basis.

Dr. Volarich stated that Mr. Rector was taking Loracet and Percocet prior to September of 2004, and that Mr. Rector's lumbar and cervical pain diagnosed by Dr. Parker were not sufficient to restrict or prevent Mr. Rector from working.

Dr. Jeffrey Parker, M.D., orthopedic spine surgeon, testified by deposition that he initially saw Mr. Rector on March 17, 2005, for complaints associated with a back injury sustained on September 24, 2004. Dr. Parker stated that x-rays showed Mr. Rector to have a congenital fusion at C3-4, preexisting degenerative disc disease at C2-3, C4-5, C5-6 and C6-7, while an MRI of Mr. Rector's low back showed preexisting degenerative changes at T12-L1, L2-3, L3-4, and some at L4-5.

Dr. Parker's initial impressions of Mr. Rector's condition were a chronic cervical strain superimposed on degenerative disc disease, right shoulder impingement syndrome with a possible right rotator cuff tear and numbness in both hands consistent with carpal tunnel syndrome. Dr. Parker referred Mr. Rector to Dr. Havey for treatment of his right shoulder and bilateral hand complaints.

In January of 2006, Dr. Parker opined that Mr. Rector had reached maximum medical improvement and stated that he had nothing else to offer Mr. Rector medically. Dr. Parker provided his disability rating on May 24, 2006. Dr. Parker found Mr. Rector to have chronic neck and back pain not appropriate for surgical intervention and rated Mr. Rector's neck and back complaints at ten percent. While Dr. Parker opined that Mr. Rector could return to work, Dr. Parker admitted that in light of Mr. Rector's back pain, restrictions on standing and sitting would be appropriate. Dr. Parker opined to Mr. Rector's ongoing need for pain management as the result of the September 24, 2004 accident and injury.

James England, rehabilitation counselor, testified by deposition that with the exception of Mr. Rector's need to recline, Mr. Rector could still be employable in some select light or sedentary positions. Mr. England stated that the Dictionary of Occupational Titles does not accurately list all components of a particular job, but rather generally describes the overall requirements for a job. Because of that difference, Mr. England felt he could place Mr. Rector in a job that might appear restricted in the Dictionary of Occupational Titles if the particular job did not require all the activities assumed by the Dictionary of Occupational Titles.

Wilber Swearingin, vocational rehabilitation counselor, testified that while either the September 24, 2004 back and neck injury or the February 17, 2005 upper extremity injuries could have caused Mr. Rector to be permanently and totally disabled, it is the need to recline as the result of the back pain that causes Mr. Rector to be permanently and totally disabled. Mr. Swearingin did not find Mr. Rector's prior back problems to be vocationally significant since no restrictions had been imposed on Mr. Rector in the past and Mr. Rector functioned well, albeit with the assistance of medication.

Pharmacy bills for prescriptions for Duragesic patches, Hydrocodone, Amitriptyline, Cyclobenzaprine, Ibuprofen, Fentanyl patches, and Celebrex in the amount of \$2928.64 were submitted into evidence. A letter from the Missouri Department of Social Services addressed to counsel for the employer/insurer reflects the Department of Social Services' right of subrogation for \$1598.36, the amount shown as paid for Lake Regional Medical Services and Laurie Healthmart Pharmacy charges in attached documents.

#### APPLICABLE LAW

Absent evidence that claimant was not liable for fees written off as bad debt, claimant's recovery would not be reduced by write-offs and fee adjustments. Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818 (Mo.banc 2003)

To prove entitlement to workers' compensation benefits for future medical care and treatment, an employee must show something more than a possibility that he will need such medical care and treatment. Rana v. Landstar TLC, 46 S.W.3d 614 (Mo.App.W.D.2001)

287.220. 1. All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability

whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

#### AWARD

The employer/insurer, Gary's Heating and Cooling/Federated Mutual Insurance Company, has sustained its burden of proof that it is entitled to a credit for the 21 days of temporary total disability benefits paid from May 24, 2006, through June 14, 2006. Dr. Parker placed Mr. Rector at maximum medical improvement from his September 24, 2004 accident in January of 2006 and again on May 24, 2006; it was on May 24, 2006 that Dr. Parker provided a permanent partial disability rating for Mr. Rector's back condition as the result of the September 24, 2004 accident and injury.

The employer/insurer is liable for past medical bills in the amount of \$3926.84. It is the position of the employer/insurer that it is not liable for these bills because of Medicaid's payment of some charges and lien in the amount of \$1598.36. In order to avoid liability for the medical bills of Dr. Jones and the pharmacy charges because of Medicaid's payment of some bills, Gary's Heating and Cooling and Federated Mutual Insurance Company must prove that Mr. Rector is not required to pay the billed amounts, that his liability for the billed amounts is extinguished and that the reason the liability was extinguished does not otherwise fall within the provisions of section 287.270. In the instant case, there is evidence of the bills, a printout from Medicaid indicating payment of some Lake Regional Medical bills and some pharmacy charges and a cover letter from Medicaid to counsel for the employer/insurer stating that they are asserting a lien in the amount of \$1598.36, the total of the charges reflected as paid on the attached printout. The items shown as covered by the Medicaid lien does not directly correlate with the bills for which payment is sought. Moreover, there is absolutely no assertion that the employee's liability for the billed amounts is extinguished.

The claimant, Jason Rector, has sustained his burden of proof that he has sustained a permanent disability of 65% of the body as the result of his neck and back injury of September 24, 2004. Mr. Rector has testified credibly with regard to his neck and back injuries and the limitations resulting from those injuries. Following his September 24, 2004 injury, Mr. Rector was able to return to work as a supervisor, albeit in a more limited capacity than that in which he was working preinjury.

Mr. Rector has sustained his burden of proof that he is entitled to additional medical treatment for his September 24, 2004 accident and injury. Doctors Parker, Lennard and Volarich all testified or opined to the

need to address the ongoing effects of Mr. Rector's September 24, 2004 accident and injury through pain management and medical procedures.

Mr. Rector has failed to sustain his burden of proof that he has a combined disability sufficient to invoke Second Injury Fund disability for permanent partial disability. While Mr. Rector received treatment for his low back prior to September 24, 2004, Mr. Swearingin found his prior back problems to be vocationally insignificant. Mr. Rector described a very active personal and job related lifestyle prior to September 24, 2004, inconsistent with the level of disability required to invoke the Second Injury Fund in a case of permanent partial disability. Likewise, Mr. Rector has failed to prove that he is entitled to permanent total disability benefits from the Second Injury Fund as the result of his September 24, 2004 accident and injury combined with preexisting disability, where there is no evidence that the combination of the September 24, 2004 accident and injury and the preexisting disability rendered Mr. Rector permanently and totally disabled.

## FINAL AWARD

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

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

Hannelore D. Fischer  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeffrey Buker  
*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.: 05-053592

Employee: Jason Rector  
Employer: Gary's Heating & Cooling  
Insurer: Federated Mutual Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: February 17, 2005  
Place and County of Accident: Camden County, 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 August 22, 2008. The award and decision of Chief Administrative Law Judge Hannelore D. Fischer, issued August 22, 2008, 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 23rd day of January 2009.

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: Jason Rector

Injury No. 05-053592

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: N/A

Employer: Gary's Heating & Cooling

Additional Party:

Insurer: Federated Mutual Insurance Company

Hearing Date: May 23, 2008

**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: February 17, 2005
  5. State location where accident occurred or occupational disease was contracted: Camden county
  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: Bilateral upper extremities
- Nature and extent of any permanent disability: 25% of elbows, bilaterally
15. Compensation paid to-date for temporary disability: \$4564.98
  16. Value necessary medical aid paid to date by employer/insurer? \$22140.51
  17. Value necessary medical aid not furnished by employer/insurer? N/A
  18. Employee's average weekly wages: \$577.50
  19. Weekly compensation rate: \$385.00/\$354.05
- Method wages computation: by agreement

**COMPENSATION PAYABLE**

- Amount of compensation payable: 25% of each elbow = 105 weeks

105 weeks x \$354.05 = \$37,175.25

One week disfigurement = \$354.05

**TOTAL: \$37,529.30**

22. Second Injury Fund liability: Permanent total disability benefits as of June 15, 2006; \$30.95 for 105 weeks; \$385.00 per week thereafter

23. Future Requirements Awarded: Future medical benefit awarded.

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 permanent disability hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Timothy McDuffey.

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

Employee: Jason Rector

Injury No: 05-053592

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents:

Employer: Gary's Heating & Cooling

Additional Party:

Insurer: Federated Mutual Insurance Company

Checked by: HDF:lw

## **FINAL AWARD**

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on May 23, 2008. Memoranda were submitted by June 16, 2008.

The parties stipulated that on or about February 17, 2005, the claimant, Jason Rector, was in the employment of Gary's Heating and Cooling. The claimant sustained an injury as the result of an occupational disease which arose out of and in the course of his employment. The employer was operating under the provisions of Missouri's workers' compensation law and liability for workers' compensation was insured by Federated Mutual Insurance Company. The employer had notice of the injury and a claim for compensation was timely filed. The claimants' average weekly wage was \$577.50 per week; the applicable compensation rate is \$385.00 per week for permanent and temporary total disability benefits and \$354.05 per week for permanent partial disability benefits. Temporary disability benefits have been paid to date in the amount of \$4564.98. Medical aid has been provided in the amount of \$22,140.51.

The issues to be resolved by hearing include 1) the liability of the employer /insurer for unpaid temporary total disability benefits for the period of June 15, 2006, through January 22, 2007, a period of 32 weeks, 2) the nature and extent of permanent disability, 3) the liability of the employer/insurer for future medical treatment, and 4) the liability of the Second Injury Fund.

The parties stipulate that disfigurement applicable to the bilateral wrist injuries which are the subject of this claim is one week.

### FINDINGS OF FACT

The claimant, Jason Rector, was 41 years old as of the date of the hearing. Mr. Rector graduated from a small high school in Camdenton, Missouri, in 1985, and began working thereafter in a variety of jobs, including sales, painting, dry walling and factory work. In 1996, Mr. Rector began his work with Gary's Heating and Cooling where he learned to install heat pumps, furnaces, return air drops, filtration systems, registers, grills, and air conditioners. Mr. Rector was a working supervisor at the time of the 2004 accident, spending 95% of his time working. Mr. Rector would typically handle furnaces weighing between 250 and 383 pounds carry a toolbox weighing 50 pounds, wear a tool belt weighing 15 to 20 pounds and handle ductwork weighing 25 to 40 pounds.

Prior to September 24, 2004, Mr. Rector testified, he had back complaints for which he saw Dr. Jones. Mr. Rector said that he had been seeing Dr. Jones since prior to 1996 for back pain and received from Dr. Jones instructions in proper lifting techniques, muscle relaxants and pain pills. According to Mr. Rector, his back pain prior to September of 2004 did not affect his ability to work or his ability to engage in outdoor activities. Prior to September 24, 2004, Mr. Rector enjoyed an active life style which included running, golfing, playing paintball, riding a jet ski; these are all activities that he can no longer enjoy as the result of the back pain he attributes to his September 24, 2004 accident.

On September 24, 2004, Mr. Rector was on a ladder 14 feet off of a concrete floor when the ladder slipped, causing Mr. Rector to fall with the ladder, his upper body hitting the concrete floor while his feet stayed on the ladder. This accident and injury is the subject of another workers' compensation claim, injury number 04.101040. Mr. Rector had immediate swelling in his hand and a knot on his elbow. Mr. Rector was seen at the hospital and referred to Dr. Jones. Mr. Rector had pain in his neck and back for which Dr. Jones prescribed physical therapy. Mr. Rector began taking pain medications daily in order to be able to work.

Mr. Rector described returning to work as a supervisor only, no longer carrying air conditioning or heat pump units. Mr. Rector described taking increasingly large amounts of pain medications and muscle relaxants. Between Thanksgiving in 2004 and January of 2005, Mr. Rector had three epidural steroid injections which failed to offer much relief of his back pain. Mr. Rector worked for five months after his September 2004 accident, although the manner in which he worked was altered.

In February of 2005, after drilling a hole in a wall for two days, Mr. Rector's hands became swollen up to his elbows. Mr. Rector last worked for Gary's Heating and Cooling on February 17, 2005. On February 18, 2005, Mr. Rector went to the hospital; apparently herniated discs in the neck and low back were diagnosed. For his symptoms in his hands, Mr. Rector was referred by Dr. Parker to Dr. Havey who performed bilateral carpal tunnel release surgeries in August of 2005. The carpal tunnel release surgeries were successful in relieving pain in the thumb, index and middle fingers of both of Mr. Rector's hands, although the last two fingers of each hand are still symptomatic. Mr. Rector testified to loss of strength and control in his hands

currently. Mr. Rector testified that he still sees Dr. Havey for the pain in his hands. Dr. Havey's notes for August 15, 2005, reflect Dr. Havey's opinion that Mr. Rector should be able to return to work after one additional month. The September 15, 2005 record of follow-up treatment indicates an additional two weeks off work to be appropriate for Mr. Rector. The following January 2006 record of Dr. Havey's treatment for Mr. Rector indicates that Mr. Rector should "continue working." When Dr. Havey last saw Mr. Rector in September of 2006, repeat nerve conduction studies of the elbow were contemplated.

Mr. Rector received temporary total disability benefits through June 14, 2006, and testified that he has not been returned to work.

Dr. David Volarich, D.O., testified that he examined Mr. Rector on July 12, 2007. Regarding the September 24, 2004 injury, Dr. Volarich found 1) lumbar syndrome secondary to disc protrusions at L3-4 and L4-5 central and to the right as well as aggravation of degenerative disc disease, with an attendant permanent disability of 22.5 percent of the body, 2) thoracic syndrome, secondary to disc protrusion at T8-9, with an attendant permanent disability of 15 percent of the body, 3) severe myofascial and chronic regional pain syndrome, with an attendant permanent disability of 25 percent of the body, 4) disc bulging at C5-6 and C6-7 as well as aggravation of degenerative cervical disc disease, with an attendant permanent disability of 20 percent of the body.

With regard to the injury leading up to February 18, 2005, Dr. Volarich found both repetitive trauma and median nerve entrapment at both wrists and overuse trauma in both elbows causing ulnar nerve entrapment. Dr. Volarich described the EMG as the better diagnostic tool to determine nerve entrapment; he found it better than the monofilament exam upon which Dr. Swango relied when he found no ulnar nerve entrapment. Dr. Volarich testified that it was Mr. Rector's work for Gary's Heating and Cooling prior to February 18, 2008 which caused his complaints in his upper extremities. Dr. Volarich opined with regard to Mr. Rector's disability as the result of his upper extremity injuries, ascribing a 35 percent disability to each hand, a 30 percent disability to the right elbow and a 15 percent disability of the left elbow. Dr. Volarich also assigned a "multiplicity" factor to the combination of upper extremity disabilities of 15 percent.

Dr. Volarich opined that Mr. Rector is in need of ongoing care at a pain clinic and that continued narcotics to control his pain syndrome are appropriate. Dr. Volarich went on to recommend epidural steroid injections, foraminal nerve root blocks, TENS units and similar treatments to control Mr. Rector's severe pain. Dr. Volarich stated that it was both the September 24, 2004 accident as well as the February 18, 2005 occupational disease which caused Mr. Rector to need additional treatment.

While Dr. Volarich had concerns about what he thought was Mr. Rector's depression, Dr. Volarich stated that he would defer analysis as to the cause of Mr. Rector's depression to a psychiatric assessment.

With regard to Mr. Rector's restrictions referable to the spine, Dr. Volarich stated that Mr. Rector would need to lie down during the day, that Mr. Rector is unable to stand for an eight-hour shift or work upright for an eight-hour shift.

With regard to a return to work, Dr. Volarich stated that if vocational assessment could not identify a suitable job, then Mr. Rector is permanently and totally disabled as a result of the work-related injuries of September 24, 2004, and leading up to February 18, 2005, in combination with each other and in combination with his preexisting lumbar syndrome present prior to lumbar September 24, 2004.

Dr. Volarich acknowledged that a functional capacity exam in which Mr. Rector participated in October of 2005 indicated that Mr. Rector was capable of work in the heavy physical demand category; however, Dr. Volarich opined that this three hour and fifty-four minute examination did not correctly reflect Mr. Rector's ability to work on a daily basis.

Dr. Volarich stated that Mr. Rector was taking Loracet and Percocet prior to September of 2004, and that Mr. Rector's lumbar and cervical pain diagnosed by Dr. Parker were not sufficient to restrict or prevent Mr. Rector from working.

Dr. John Swango, an orthopedic surgeon specializing in hand and upper extremity surgery, testified by deposition that he saw Mr. Rector on November 22, 2006, for a medical evaluation. Mr. Rector had had endoscopic bilateral carpal tunnel releases and continued to have symptoms in his upper extremities after surgery.

While Dr. Swango thought that Mr. Rector had achieved a good result from his bilateral carpal tunnel surgeries, Dr. Swango opined that Mr. Rector's "residual symptoms were likely either to be from an ulnar nerve entrapment at the elbow and/or degenerative disk disease of the cervical spine." Dr. Swango went on to state that the cause of the upper extremity symptoms "was his job related activities working for his former employer, Gary's Heating and Cooling, and specifically ....the repetitive trauma, use of hand tools, and the fall resulted in those symptoms." A Semmes Weinstein monofilament test done on January 11, 2007, indicated a fairly normal result for both hands, indicating to Dr. Swango Mr. Rector's lack of ulnar nerve entrapment.

In January of 2007, Dr. Swango felt that Mr. Rector was at maximum medical improvement, that Mr. Rector did not need additional medical treatment and that Mr. Rector has a 13 percent permanent partial disability of the left and right upper extremities at the wrists. Dr. Swango reiterated that it was Mr. Rector's work for Gary's Heating and Cooling that caused Mr. Rector's bilateral carpal tunnel syndrome and his tendonitis in his elbows and forearms bilaterally.

With regard to work Mr. Rector could perform in light of his upper extremities, Dr. Swango described "nonrepetitive fairly sedentary type" work involving no frequent or continuous lifting or frequent or constant handling or frequent or constant fingering throughout the day.

James England, rehabilitation counselor, testified by deposition that with the exception of Mr. Rector's need to recline, Mr. Rector could still be employable in some select light or sedentary positions. Mr. England stated that the Dictionary of Occupational Titles does not accurately list all components of a particular job, but rather generally describes the overall requirements for a job. Because of that difference, Mr. England felt he could place Mr. Rector in a job that might appear restricted in the Dictionary of Occupational Titles if the particular job did not require all the activities assumed by the Dictionary of Occupational Titles.

Wilber Swearingin, vocational rehabilitation counselor, testified that while either the September 24, 2004 back and neck injury or the February 18, 2005 upper extremity injuries could have caused Mr. Rector to be permanently and totally disabled, it is the need to recline as the result of the back pain that causes Mr. Rector to be permanently and totally disabled. Mr. Swearingin did not find Mr. Rector's prior back problems to be vocationally significant since no restrictions had been imposed on Mr. Rector in the past and Mr. Rector functioned well, albeit with the assistance of medication.

#### APPLICABLE LAW

To prove entitlement to workers' compensation benefits for future medical care and treatment, an employee must show something more than a possibility that he will need such medical care and treatment. Rana v. Landstar TLC, 46 S.W.3d 614 (Mo.App.W.D.2001)

287.220. 1. All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries

or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

#### AWARD

The claimant, Jason Rector, has sustained his burden of proof that he has sustained a permanent disability of 25 percent of each upper extremity at the level of the elbow as the result of his occupational disease caused by his job duties for Gary's Heating and Cooling. Mr. Rector has testified credibly with regard to his bilateral upper extremity injuries and the limitations resulting from those injuries.

Mr. Rector has likewise sustained his burden of proof that he is permanently and totally disabled as the result of the combination of his bilateral upper extremity injuries combined with his preexisting disability to his back. Mr. Rector testified to the devastating effect his combined injuries have had on his ability to engage in gainful employment. Dr. Volarich testified that Mr. Rector's disability is as the result of the combination of his back and wrist injuries. Mr. Swearingin found that either the back or the hand injuries could have caused Mr. Rector's permanent total disability; however, Mr. Rector was able to work subsequent to his September 24, 2004 back injury and it was not until the February 17, 2005 occupational disease caused him to seek treatment and further limit his activities that Mr. Rector found himself unable to work. Thus, the Second Injury Fund is liable for permanent total disability benefits.

Mr. Rector has sustained his burden of proof that he is entitled to permanent total disability benefits from June 15, 2006 forward. According to Dr. Havey, Mr. Rector was temporarily totally disabled as the result of his upper extremity injuries until around the beginning of October of 2005. At that time, however, Mr. Rector was still receiving temporary total disability benefits as the result of his September 24, 2004 back injury. Thus, Mr. Rector is entitled to permanent total disability benefits from the date of maximum medical improvement of his condition. Benefits as of June 15, 2006, forward were sought and are awarded.

Finally, Mr. Rector has sustained his burden of proof that he is entitled to additional medical treatment for his upper extremities. Doctors Havey and Volarich suggested aggressive treatment of Mr. Rector's upper extremity complaints. Dr. Swango opined that the elbow complaints were related to the February 17, 2005 work injury, but differed with regard to his diagnosis and treatment options. While Dr. Volarich's recommendation pertaining to additional medical treatment is somewhat vague and appears to be primarily concerned with treatment of Mr. Rector's back complaints, the treatment records support Mr. Rector's

ongoing need for pain medications for his upper extremities as well as for his back.

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

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

Hannelore D. Fischer  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeffrey Buker  
*Director*  
*Division of Workers' Compensation*