

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

Injury No.: 98-043126

Employee: Philip Rose
Employer: Lambur Contracting, Inc.
Insurer: Missouri Employer's Mutual Insurance Company
Date of Accident: May 1, 1998
Place and County of Accident: St. Louis, 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 December 10, 2004. The award and decision of Administrative Law Judge Margaret D. Landolt, issued December 10, 2004, 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 May 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Phillip Rose Injury No.: 98-043126
Dependents: N/A Before the
Division of Workers'

Employer: Lambur Contracting, Inc. **Compensation**
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Missouri Employer's Mutual Insurance Company
Hearing Date: September 15, 2004 Checked by: MDL:tr

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: May 1, 1998
5. State location where accident occurred or occupational disease was contracted: St. Louis
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:
Employee threw a ladder into a truck when he felt pain in his rib cage.
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: Body as a whole, ribs
14. Nature and extent of any permanent disability: 5% permanent partial disability of the body as a whole referable to the ribs
15. Compensation paid to-date for temporary disability: \$38,982.86
16. Value necessary medical aid paid to date by employer/insurer? \$42,252.72

Employee: Phillip Rose Injury No.: 98-043126

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$439.65
19. Weekly compensation rate: \$293.10 for temporary total disability and \$278.42 for permanent partial disability benefits
20. Method wages computation: Per statute/By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:
20 weeks of permanent partial disability from Employer \$5,568.40
Less credit to Employer (\$35,588.52)

22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: N/A

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: | Phillip Rose | Injury No.: 98-043126 |
| Dependents: | N/A | Before the |
| Employer: | Lambur Contracting, Inc. | Division of Workers' |
| Additional Party: | Second Injury Fund | Compensation |
| Insurer: | Missouri Employer's Mutual Insurance Company | Department of Labor and Industrial |
| | | Relations of Missouri |
| | | Jefferson City, Missouri |
| | | Checked by: MDL:tr |

PRELIMINARIES

A hearing was held on September 15, 2004, at the Division of Workers' Compensation in the City of St. Louis. Phillip Rose ("Claimant") was represented by Mr. Harry J. Nichols. Lambur Contracting, Inc. ("Employer") and its Insurer Missouri Employers Mutual Insurance Company were represented by Mr. Patrick N. McHugh. Although the Second Injury Fund is a party to this case, counsel for the Second Injury Fund did not participate in the hearing. Mr. Nichols sought a fee of 25% of any benefits awarded to Claimant.

The parties stipulated that Claimant sustained an accident arising out of and in the course of his employment on or about May 1, 1998; Employer received timely notice of the accident, and a Claim for Compensation was timely filed. The parties further stipulated that the applicable permanent partial disability rate is \$278.42; Employer has paid temporary total disability benefits for 108 2/7 weeks at a rate of \$360.00, for a total of \$38,982.86. These benefits were paid for the periods of May 7, 1998 through July 8, 1998 and October 22, 1999 through January 9, 2002. Employer has also paid medical benefits in the amount of \$42,252.72. The parties further stipulated that Employer has paid Claimant an advance on compensation in the amount of \$2,227.36 and that Employer is entitled to a credit in this amount against any benefits awarded.

The issues for determination by hearing are whether the injuries claimed are medically/causally related to the accident

of May 1, 1998; whether Employer is liable for past temporary total disability benefits; nature and extent of permanent partial disability benefits; the applicable temporary total disability rate and, if it is found that the applicable rate is less than the \$360.00 rate paid, Employer's entitlement to a credit for overpayment of temporary total disability benefits paid to date; and Employer's entitlement to a credit for past medical expenses incurred in the event the Employer is successful on its medical causation defense.

FINDINGS OF FACT

Based upon the substantial and competent evidence, I find:

Claimant, a 39-year-old male, has been employed as a laborer for Employer for 14 years. Employer is in the business of residential tree trimming. Claimant's work involves trimming and removal of tree branches. This involves climbing trees by hand and using chainsaws to remove branches.

On Friday, May 1, 1998, Claimant threw a 12 foot wooden steep ladder into the back of a truck and felt a "pull" in the bottom of his right rib cage. He described this as a "cramp" type sensation and assumed he had pulled a muscle.

Claimant was seen at St. Joseph Emergency Room on May 4, 1998, and gave a history consistent with his testimony. A diagram of his injury referenced tenderness of the right rib cage below the chest and a reference that he had sustained a "similar rib injury one year ago." X-rays of the right ribs revealed no evidence of fracture and he was referred to follow-up with Dr. Nogalski.

Claimant was seen by Dr. Nogalski on May 7, 1998, who diagnosed a right rib strain (seventh anterior). Physical therapy was recommended and Claimant was given a 5-pound lifting restriction.

Claimant testified his pain moved to his chest and right shoulder, and he was again seen at St. Joseph Hospital on May 10, 1998. This medical record revealed Claimant developed marked respiratory distress, fever, and persistent right-sided chest pain 48 hours prior to this admission. Chest x-rays revealed a huge right pleural effusion, and a chest tube was inserted in the emergency room to evacuate fluid that had collected in his lung. Claimant was admitted to the hospital through May 13, 1998, and the final diagnosis was exudative right pleural effusion/early empyema and right lower lobe consolidation. The chest tube was removed on May 13, 1998, and Claimant was discharged that day.

Claimant followed up with Dr. Victor Ruiz and Dr. Joseph Ojile who had treated him during his hospitalization. Neither physician could explain the cause of his right lung condition. Dr. Ruiz commented, "As you know, we have not been able to find a cause for his huge effusion and consolidation of the right lower lobe." Dr. Ojile also described this illness as "ill defined." Both Dr. Ruiz and Dr. Ojile released Claimant to return to full work activities as of July 9, 1998.

Claimant testified that his right side again started to hurt upon his return to work. He was then referred to Dr. Gerlyn Friesenhahn, a Board Certified Neurologist. Dr. Friesenhahn took a history of his accident and course of treatment and specifically noted, "A chest tube was placed on May 10, 1998, the tube was removed after three days, and immediately when it was pulled out he felt an irritation that radiated around the anterior chest. Over a few weeks it spread to an anterior portion of the chest and it has not changed since then. Now when he wears a shirt it irritates the skin. He complains of numbness in the area of the chest tube site. He has no back pain. He has some slight shoulder pain." Dr. Friesenhahn diagnosed Claimant's symptoms as compatible with "intercostal nerve injury and neuralgia status post-chest tube placement." Dr. Friesenhahn re-examined Claimant on July 31, 1998, noted no improvement and considered referring him for a nerve block of the intercostal nerve. She also prescribed Neurontin. This provided no benefit. By October 19, 1998, Claimant's symptoms had worsened and Dr. Friesenhahn advised that he be referred for an intercostal nerve block, with a consideration of a nerve ablation procedure.

Claimant was seen on March 10, 1998 by Dr. Cynthia Guy at West County Pain Control Center. Dr. Guy also recorded a history that Claimant felt immediate pain when his chest tube was removed and that Claimant had asked a thoracic surgeon about this pain before he left the hospital. She further noted, "He describes a right-sided

chest pain as constant pain, 'pulled muscles and nerves', burning in nature and fatigue from the pain. Any activity or slight touch increases the pains in this area." Dr. Guy recommended trying trigger point injections to relieve musculoskeletal pain and dysfunction prior to subjecting Claimant to an intercostal nerve block. She administered a series of three trigger point injections followed by physical therapy. Claimant testified that these trigger point injections provided him no relief. On January 13, 1999, Dr. Guy referred Claimant to a physical medical and rehabilitation specialist, Dr. Russell Cantrell.

Dr. Cantrell examined Claimant on January 26, 1999. He concluded that Claimant's work injury of May 1, 1998 of throwing a ladder into a truck and lifting heavy logs could have resulted in an intercostal and pectoralis muscle strain injury, but he concluded Claimant's pneumothorax, pleural effusion and right lower lobe consolidation was not substantially caused by his work injury. He specifically noted that the placement of a chest tube and its reported sequelae was not a direct result of the work injury. He noted the trigger point injections performed by Dr. Guy were to address residual tightness in the pectoralis minor and serratus anterior muscles and related to the work injury. He recommended Claimant continue his regular job duties. Claimant returned to Dr. Cantrell on February 16, 1999 reporting that he had experienced transient anterior chest and shoulder pain while maneuvering a branch the day before this examination. He therefore recommended Claimant be re-evaluated by Dr. Guy for a trigger point injection in the pectoralis minor muscle. Claimant returned to Dr. Guy on March 3, 1999 but she did not administer a trigger point injection because the risk of complications from triggering this area was too high (right pneumothorax). She recommended physical therapy for myofascial relief, and Claimant attended a course of physical therapy from March 19 through April 2, 1999.

Claimant was thereafter seen by Dr. Kevin A. Coleman on April 14, 1999. Dr. Coleman took a history, examined Claimant and provided a diagnosis of intercostal neuralgia, myofascial pain and tobacco abuse. He did not feel Claimant's initial trial of Neurontin was sufficient and restarted him on this medication. However, Dr. Coleman later noted that medications did not have "any long-lasting effects on his pain", and Claimant contacted him about trying an injection. On June 6, 1999, Dr. Coleman administered a thoracic epidural at the T9-10 area to address "thoracic radicular pain" and "neurotic pain." Claimant testified he experienced pain and numbness directly over the injection site immediately following this procedure. He testified this was the first time he experienced any back pain since his accident.

Claimant continued to work for Employer on a full-time basis from his release in July of 1998, until approximately three weeks after his epidural steroid injection. He testified that after the pay period of July 9, 1999, he took vacation and then remained off work through October 1, 1999 because of mid-back pain. During his testimony, he made reference to Exhibit T identified as a payroll printout obtained from his boss, Gary Lambur. This exhibit identifies payments of wages in the amount of \$423.60 on July 9, 1999, essentially consistent with weekly pay received during the five months preceding this week. Thereafter, this exhibit references lower weekly wages for the pay periods of July 16, 1999, July 23, 1999, July 30, 1999, August 13, 1999, and October 1, 1999. There is no reference to payments made for the weeks ending August 6, 1999, and August 20, 1999 through September 30, 1999. Claimant testified he worked only a limited number of days in October although Exhibit T references essentially full pay up through October 22, 1999.

Claimant offered the medical report of Dr. Cantrell dated July 29, 1999. On examination, Claimant reported experiencing pain in the posterior thoracic area following the epidural steroid injection. He also reported several on the job exacerbations of mid back and chest wall pain. Dr. Cantrell did not believe his present thoracic lumbar pain was associated with his work-related injury or recent epidural steroid injection, and returned him to his regular job duties without restrictions.

Claimant testified Employer then sent him to Dr. Joseph Hanaway for evaluation. He recalls Dr. Hanaway performing tests and injections at the site of his previous epidural steroid injection. Dr. Hanaway testified Claimant was referred to him by his attorney. His testimony and records confirm an initial evaluation on September 13, 1999, and treatment through October 24, 2000. Trigger point injections at the post-epidural site were administered on March 3, 2000, March 18, 2000, and March 20, 2000. Remaining treatment consisted of pain medications. Dr. Hanaway kept Claimant off work throughout the entire course of treatment. Dr. Hanaway noted on July 26, 2000, that Claimant began treating with Dr. Matthew Gornet for his mid-back condition.

Claimant testified Dr. Hanaway referred him to Dr. Gornet. Dr. Gornet's office records suggest otherwise,

and confirm this referral was made by his attorney. Dr. Gornet examined Claimant on July 24, 2000, and concluded he had developed local bursitis over his previous epidural steroid injection site. He recommended either a localized steroid injection or excision of the bursa. Claimant did not return to Dr. Gornet until March 1, 2001, and, following a recommended MRI of the site, he administered a series of injections with limited affect. He thereafter performed a thoracic decompression, partial laminectomy involving the removal of a spinous process over the painful portion of his thoracic region. Claimant returned to Dr. Gornet for follow-up visits on September 27, 2001, November 19, 2001, and January 10, 2002. Dr. Gornet noted on January 10, 2002, that Claimant had only slight tenderness in his back and placed him at maximum medical improvement. He placed no restrictions on him and asked him to only follow-up as needed. Claimant returned to Dr. Gornet one more time on June 3, 2002, with complaints of burning to the right side of his incision with heavy bending and lifting. Dr. Gornet noted these symptoms were different from his original symptoms and were "probably some muscle fatigue or discomfort related to the surgery itself." He again confirmed that Claimant was at maximum medical improvement. Claimant testified he recalls seeing Dr. Hanaway one more time for an evaluation after being released from Dr. Gornet's care. This evaluation was scheduled at his attorney's request and conducted on September 17, 2002.

Claimant testified that he continues to have symptoms with respect to his right side, right shoulder and mid upper back region. With respect to his rib complaints, he described the feeling as a "cramp" that he experienced sometimes with breathing. He has no tenderness in this area. Referring to his upper chest/right shoulder area, he experiences burning sensation when he lifts objects in front of him. Regarding back pain, he experiences numbness all of the time at the site of his epidural steroid injection and surgery. This numbness has been present since the epidural steroid injection. He explained that this area is not as painful as it once was, and does not prevent him from performing his job duties. He made no complaints of back pain other than mid-back pain at the site of the epidural injection.

Claimant continues to perform the full range of his job duties, including climbing trees, using chainsaws and lifting and moving heavy tree limbs and equipment. He testified that he tries to avoid work that requires him to handle the limbs but this is still part of the work that he does. In addition to the full-time work he performs for Lambur Contracting, Inc., he is also able to perform tree trimming work on his own as a side business. He admitted that the work he does on the side is on a cash basis and does not report his income from this work to the IRS, explaining "cash is king." Finally, he stated he was able to bend without difficulty, reach overhead without difficulty, jog, throw a ball and twist his upper body without pain and difficulty.

Dr. Hanaway testified on behalf of Claimant. Dr. Hanaway conducted a final evaluation for disability purposes at Claimant's attorney's request on September 17, 2002. Dr. Hanaway testified with respect to causation and disability relating to Claimant's lung, chest, mid-back and low back conditions.

Dr. Hanaway initially testified on direct examination that he was not sure of any connection between Claimant's pleurisy and pneumonia and the work-related accident. He later suggested that all medical conditions reviewed, including the pneumonia, were related to the work injury. However, on cross examination, he conceded that although Claimant did have serious pulmonary problems, including pleurisy and pneumonia, these problems had nothing to do with his work-related accident. He further admitted Claimant's May 10, 1998 hospitalization was for treatment of his lung condition and unrelated to the work-related accident.

Dr. Hanaway testified on direct examination that Claimant developed muscle pain in the anterior chest and his pectoralis major muscle as a result of the ladder throwing incident occurring in May of 1998. He assessed 10% permanent partial disability because of this "muscle strain." He justified this disability rating by stating, "because it lasted", and noted, "It's still persisting but the patient can live with it. He can work with it."

Dr. Hanaway also assessed 10% permanent partial disability of the person at the low dorsal region. He initially testified that this condition was directly related to the work-related injury. The basis given for his causation opinion was his understanding that Claimant developed mid-dorsal back pain in this accident that persisted after his pleurisy cleared. It was his understanding that many attempts were made by several doctors to rid Claimant of this mid-back pain, including multiple injections, but this treatment failed. He testified that a mid-dorsal epidural injection was performed to "treat the original symptoms of mid-dorsal back pain and right anterior chest pain." This epidural injection resulted in a severe increase in Claimant's pain and required surgical removal of "the needle track, which was the source of the pain."

On cross-examination, Dr. Hanaway was asked to review Claimant's treatment records. He was then asked to reconsider his causation opinion and provided the following testimony, "You are correct. I looked at probably four or five different doctors' notes dealing with the pain problem, and you are absolutely right. The first time back pain appeared was after he had the epidural injection in his mid-back, which was for his intercostal neuralgia." Dr. Hanaway went on to explain that the intercostal neuralgia was caused by the removal of the chest tube, which had been inserted for treatment of his non work-related pneumonia and pleurisy. He later attempted to suggest that the epidural injection could have been performed for both intercostal neuralgia and myofascial pain based on the diagnosis of both of these conditions. However, he conceded that this was just an assumption and ultimately only Dr. Coleman would be able to answer this question.

Finally, Dr. Hanaway assessed 20% permanent partial disability for a protruding disc at L4-5 and another 5% for sciatica resulting from this disc protrusion. He causally related this condition to the accident by assuming Claimant experienced low back pain in the accident that had gotten worse since Claimant returned to work in January of 2002. He explained this low back condition was "masked by all the frenzy to get rid of the mid-dorsal back pain."

On cross-examination, Dr. Hanaway admitted he could find no record of any back pain, including low back pain, prior to the epidural injection. He said he thought Claimant mentioned to him that he initially had low back pain but conceded if there was no previous history of back pain in any of the treatment records, he would acknowledge this condition would not be related to this work accident. Dr. Hanaway's records were attached as an exhibit to this deposition. He recorded the following history on his final evaluation of September 17, 2002: "Post operatively the patient still has mid-back pain. He has seen Dr. Gornet a couple of times since, but now the patient has been developing midline low back pain at the belt-line. He has never had this before. The patient is known on MRI to have a bulging disc at L4-5 on a previous scan done in 1999, but not much was made of this because the patient did not have any complaint. Now he is beginning to develop pain in the midline low back at the belt-line."

The medical report of Herbert E. Rosenbaum, M.D., a neurologist, was offered on behalf of Claimant. Dr. Rosenbaum examined Claimant on June 13, 2000. Dr. Rosenbaum was unable to establish a relationship between Claimant's work accident and inflammatory lung process. Causation aside, he noted Claimant's course of treatment to be consistent with the inflammatory lung condition from which he had several "unusual reactions to treatment, including removal of the drainage tube and epidural block."

Dr. Lee, an orthopedic surgeon, testified on behalf of Employer. Dr. Lee examined Claimant on behalf of Employer on December 20, 2002. Claimant made complaints of back pain in the lower thoracic region at midline, low back and right anterior shoulder region into the chest region to the lower right rib cage. He initially denied prior symptoms in his shoulder. Dr. Lee noted the records revealed a prior shoulder dislocation and Claimant then acknowledged this occurred when he fell out of a tree in the early '90s. This resulted in some decrease in motion of the shoulder.

Dr. Lee's examination revealed a marked tenderness response to palpation over the 5 cm to 6 cm incision at the midline in his lower thoracic region. He noted a limitation of full flexion and internal rotation of his right shoulder, which Claimant said was in line with his previous dislocation. It was tender in the pectoralis tendon and musculotendinous junction in the upper chest near his right shoulder. His back showed flexion such that he could only touch his upper thigh and Claimant told Dr. Lee he didn't like to bend further. Claimant wouldn't perform backward extension as he told Dr. Lee he didn't bend backwards because that's where it really hurts. Dr. Lee concluded that Claimant had right flank pain that was status post thoracic decompression for a prominent spinous process. Dr. Lee did not feel Claimant needed any further medical treatment for this condition. Dr. Lee opined that Claimant had 4% permanent partial disability of the body as a whole with 2% being related to the spine surgery condition and 2% related to the thoracic condition.

Regarding causation, Dr. Lee confirmed that the bursitis overlying the spinous process could have been caused by the epidural steroid injection. It was also his opinion that the epidural steroid injection was administered for treatment of the intercostal neuritis caused by the chest tube insertion needed for Claimant's collapsed lung.

On cross-examination, Dr. Lee admitted Claimant's ability to bend laterally in each direction would be about a two-thirds decrease of normal, assuming that was Claimant's true ability. Dr. Lee questioned whether this was in fact his true ability. Regarding Claimant's inability to perform backward extension because of pain, Dr. Lee

confirmed that this was related to his upper back condition.

The payment log of workers' compensation benefits paid to Claimant revealed payment of temporary total disability benefits at a weekly rate of \$360.00 from May 7, 1998 through July 8, 1998, and October 22, 1999 through January 9, 2002. The Wage Statement prepared by Gary Lambur on May 13, 1998 for the 13 weeks prior to the date of accident confirmed Claimant's gross earnings during that period to be \$5,706.00. Claimant averaged 29.31 hours per week during this period of time. The Report of Injury confirmed Claimant's rate of pay was \$15.00 per hour. Claimant testified that his work was seasonal but can work up to 40 to 45 hours per week. Claimant admitted he had no specific recollection of the days or hours he was working in the three months prior to the May 1, 1998 accident.

RULINGS OF LAW

Based upon the above evidence, I find:

Medical Causation

There is no dispute that Claimant sustained an accident arising out of and in the course of his employment on May 1, 1998 while working as a tree trimmer for Employer. Employer disputes that all of the injuries and resulting disability claimed by Claimant are medically causally related to this accident. Specifically, Employer disputes the causal relationship between this accident and injuries to Claimant's pulmonary system, the sequelae of injuries, and the disability that may have arose out of treatment for this condition.

The Claim for Compensation alleges injuries to Claimant's "lungs." The evidence supports Claimant was admitted to St. Joseph Hospital ten days after this accident for treatment of pleural effusion and right pneumothorax. However, there is no evidence to support a causal relation between this medical condition and the May 1, 1998 work accident. Claimant's own expert, Dr. Hanaway, testified that he could not find a causal relationship between this lung condition and the work injury. Dr. Rosenbaum and Dr. Thomas Lee came to the same conclusion. These opinions are consistent with opinions of Claimant's initial treating physicians, Dr. Ojile and Dr. Ruiz, who were unable to identify the cause of his pulmonary illness. Therefore, there is insufficient evidence to support a finding that Claimant sustained any pulmonary illness or injury to his lungs as a result of this accident.

Treatment for Claimant's pulmonary illness required the insertion and removal of a chest tube. Prior to insertion of this chest tube, medical records confirm Claimant's injury was confined to a strain of his right lower rib cage. Claimant told Dr. Friesenhahn on July 17, 1998 that he felt an irritation that radiated around the anterior chest immediately upon removal of this chest tube and that over the next few weeks this spread to an anterior portion of his chest. Dr. Friesenhahn concluded Claimant's symptoms were compatible with an intercostal nerve injury and neuralgia status post chest tube placement. Claimant gave a similar history to Dr. Guy. He told her that he felt immediate pain when the chest tube was being pulled and asked the thoracic surgeon about the pain before he left the hospital. Claimant described a right sided chest pain as constant pain, "pulled muscles and nerves" and burning in nature and fatigue from the pain. Dr. Hanaway testified unequivocally that the chest tube placement was for treatment of a non work-related injury and that Claimant's intercostal neuralgia was caused by the placement and removal of this chest tube. Dr. Lee also testified Claimant's right flank pain was related to the intercostal nerve distribution that was again, related to the chest tube insertion. Therefore, I find Claimant's chest injury and intercostal neuralgia to be unrelated to this work injury.

The first time Claimant had any back pain was following an epidural steroid injection administered by Dr. Kevin Coleman. Medical records confirm Dr. Coleman performed a "thoracic epidural local anesthetic injection and a steroid injection" at St. Anthony's Medical Center on June 16, 1999. The operative report indicates this injection was administered to treat "thoracic radicular pain" and "neurotic pain." Dr. Coleman further notes Claimant was offered either an intercostal block or thoracic epidural to treat this condition. The evidence supports Claimant thereafter experienced significant pain and numbness directly over the portion of his spine where this epidural steroid was administered. Dr. Gornet eventually diagnosed this as local bursitis over the previous epidural steroid injection, and surgically excised a portion of his spinous process at this location identified as T10-11. Claimant testified this surgery helped his condition and he has been able to return to work on a full-time basis as a tree trimmer. However, he continues to have complaints of pain and numbness in this area.

All the medical evidence supports that Claimant's intercostal neuralgia was causally related to placement and removal of the chest tube and not the work-related injury. Dr. Hanaway did initially relate the need for the epidural steroid injection to the work-related accident, but the facts upon which he based this opinion were inaccurate and contrary to the evidence in this case. Specifically, Dr. Hanaway incorrectly assumed the epidural steroid injection was administered for mid-back pain that had been persistent since the work accident occurred. However, upon review of the treatment records, he conceded this assumption was wrong and changed his causation opinion. Dr. Hanaway concluded that the epidural steroid injection was administered to treat Claimant's intercostal neuralgia. This opinion is consistent with the stated purpose for these injections contained in Dr. Coleman's operative note, and the conclusions reached by Dr. Rosenbaum and Dr. Lee. Dr. Hanaway could not state with any certainty that this injection was to treat any work-related condition and deferred to Dr. Coleman on this

issue. There is no testimony or opinion from Dr. Coleman addressing this issue. Therefore, I find that the epidural steroid injection was for treatment of a non-work related injury and the sequelae of treatment for mid-back symptoms, and any resulting disability, was not medically causally related to the work accident.

Dr. Hanaway attempted to causally relate a protruding disc at L4-5 and sciatica resulting from this disc protrusion to this work accident. The Claim for Compensation does not allege a low back injury. To the extent that the allegation of injury to "Body as a Whole" attempts to make a claim for this condition, I find that there is insufficient evidence to support a finding that Claimant sustained a low back injury in this accident. Foremost, Claimant's testimony at Hearing failed to include any suggestion that he injured his low back in this accident. He also failed to make any physical complaints relative to his low back or lower extremities. I also find that Dr. Hanaway's testimony on this issue is not credible. Dr. Hanaway unequivocally stated in his September 17, 2002 report that Claimant was just developing mid-line low back pain and that, "He has never had this before." Dr. Hanaway also confirmed with Claimant that he did not have any low back complaints in 1999 when his mid-back condition was being evaluated and, again, recorded that Claimant's low back pain was just "beginning to develop." Therefore, I find that there is insufficient evidence to support a conclusion that Claimant sustained a low back injury in this accident.

There is medical evidence to support Claimant sustained a muscular strain to his right lower rib cage. The records from Claimant's initial emergency room treatment and evaluation by Dr. Nogalski confirm he sustained a strain of the right lower rib cage. There is no mention of any other injury symptomatology, including upper chest, shoulder or back pain. Therefore, I find that this accident resulted in a strain of Claimant's right rib cage.

Permanent Partial Disability

Claimant testified that his ribs are no longer tender but that he does feel a "cramp" sensation with breathing. He admits that he has not been prevented from returning to the strenuous job as a tree trimmer, and is able to perform all of his job duties, including climbing trees and using chainsaws. Most of his complaints relate to his mid-back and upper chest/shoulder region which, again do not significantly restrict his physical activities. Therefore, I find Claimant has sustained 5% permanent partial disability of the body as a whole referable to his rib cage injury.

Past Temporary Total Disability

Claimant alleges an entitlement to an unspecified period of temporary total disability for time lost from work in the late summer and early fall of 1999. He testified he worked full-time up to the pay period ending July 9, 1999, and worked only sporadically until he began receiving temporary total disability benefits beginning October 22, 1999. Claimant's testimony and corresponding payroll records confirm Claimant received no paychecks for the weeks ending August 6, 1999, and August 20, 1999 through September 30, 1999, and reduced paychecks for the weeks ending July 16, July 23, July 30, August 13, and October 1, 1999.

Claimant introduced conflicting medical evidence as to his ability to work during this period of time. Claimant introduced Dr. Cantrell's medical opinion of July 29, 1999 that concluded he was capable of returning to work at full duty. He also introduced records confirming Dr. Hanaway took him off work as of September 13, 1999. Regardless, both physicians identified Claimant's complaints related directly to his mid-back symptoms associated with the epidural steroid injection. As noted above, these symptoms were not related to the work accident. Therefore, I find no causal relation between any missed work during this period of time and the work accident and the claim for past due temporary total disability benefits is denied.

Temporary Total Disability Rate

Claimant was paid at an hourly rate of \$15.00 in the 13 weeks preceding this accident. He admitted his work was seasonal but that he could work up to 40 to 45 hours per week. He had no specific recollection of the hours he worked in the 13 weeks prior to this accident. The Wage Statement offered by Employer reveals Claimant worked an average of 29.31 hours per week in the 13 weeks preceding the accident and generally worked three to four days per week. There is no evidence that Claimant missed any regular or scheduled workdays in this period of time. Therefore, I find Claimant's average weekly wage to be \$439.65 and applicable temporary total disability rate to be \$293.10.

Credit for Advancement/Overpayment of Compensation Benefits

Claimant was paid temporary total disability benefits for a total of 108 2/7 weeks at a rate of \$360.00. Employer is entitled to a weekly credit for overpayment of temporary total disability benefits in the amount of \$66.90. Additionally, benefits paid from October 22, 1999 through January 9, 2002 were paid while Claimant was off work because of the complications from the epidural steroid injection. Although Claimant may have been in need of financial support during this period of time, he was not entitled to workers' compensation benefits for temporary total disability. Liberal construction of the Act pursuant to Section 287.800 requires a construction that will not penalize an employer "who promptly or more than sufficiently" meets the needs of an employee "at the time of that employee's greatest need." *Point v. Westinghouse Electric Corp.*, 382 S.W.2d 436 (Mo.App. 1964). As such, an employer who has paid more than it was obligated to, "should not be penalized by being denied full credit for the amount paid above the requirements of the act as against the amount which

might subsequently be determined to be due the employee." *Id.* at 411.

Therefore, I find Employer is entitled to a credit for a permanent partial disability advance in the amount of \$2,227.36 made on March 6, 2001, overpayment of temporary total disability benefits in the amount of \$66.90 per week for 9 3/7 weeks from May 7, 1998 through July 8, 1998, or \$630.75, and the full amount of benefits paid for 98 6/7 weeks from October 22, 1999 through January 9, 2002 or \$35,588.52. I do not find any legal authority for an award of a credit for the medical expenses paid by Employer for Claimant's pulmonary condition and the resulting complications that were not medically caused by his work accident.

Since Employer's total credit of \$38,446.63 far exceeds Claimant's entitlement to permanent partial disability benefits of \$5,568.40, Employer owes no additional compensation benefits.

Because the award of 5% permanent partial disability does not meet the thresholds for liability for the Second Injury Fund, the claim against the Second Injury Fund is dismissed.

No attorney's fees are awarded.

Date: _____ Made by: _____

Margaret D. Landolt
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Gary J. Estenson

Acting Director
Division of Workers' Compensation