

**FINAL AWARD ALLOWING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge  
with Supplemental Opinion)

Injury No.: 08-098439

Employee: Hugh David Smith  
Employer: Roberts Dairy Company, LLC  
Insurer: Fidelity & Guaranty Insurance  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Dismissed)

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have read the briefs, reviewed the evidence and considered the whole record. We find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge, as supplemented herein.

We offer this supplemental opinion to articulate the reason we affirm the administrative law judge's denial of future medical treatment in this matter.

The only medical expert to opine that employee needed ongoing medical care was Dr. Koprivica. In a September 22, 2009, report, Dr. Koprivica wrote:

Mr. Smith has ongoing treatment needs as a direct necessity of the October 17, 2008, injury.

I would recommend that Mr. Smith be provided ongoing care and treatment. Specifically, he should be provided access to a facility where he can do self-directed aqua-therapy on an ongoing basis. This will be an indefinite need.

Dr. Koprivica examined employee and wrote his report relatively soon (eleven months) after employee sustained his injury. In the subsequent four years leading up to the trial of this matter, Dr. Koprivica did not issue any supplemental reports confirming that employee's "indefinite need" for aqua-therapy persisted. Employee did not call Dr. Koprivica to testify at trial or by deposition regarding employee's current condition or present need for aqua-therapy. Dr. Koprivica's statement four years before trial that employee then had an "indefinite need" for access to aqua-therapy does not convince us it is reasonably probable that employee *now* needs – or ever will need – access to a facility where he can perform

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2008, unless otherwise indicated.

Employee: Hugh David Smith

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self-directed aqua-therapy to cure and relieve the effects of his injury.<sup>2</sup> For this reason, we affirm the administrative law judge's denial of future medical care.

We approve and affirm 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.

We attach, adopt, and incorporate the December 11, 2013, award and decision of Administrative Law Judge Mark S. Siedlik.

Given at Jefferson City, State of Missouri, this 13<sup>th</sup> day of June 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

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<sup>2</sup> See *Poole v. City of St. Louis*, 328 S.W.3d 277, 292 (Mo. App. 2010)(employee bears the burden of showing "by reasonable probability that he is in need of additional medical treatment by reason of his work-related accident").

## FINAL AWARD

Employee: David Smith Injury No. 08-098439  
Dependents: N/A  
Employer: Roberts Dairy Company, LLC  
Insurer: Fidelity & Guaranty Insurance/Broadspire Services, Inc.  
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund (Dismissed)  
Hearing Date: October 2, 2013 Checked by: MSS/pd

### 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: October 17, 2008
5. State location where accident occurred or occupational disease was contracted: Jackson County, Missouri
6. Was above Employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While working in the course and scope of employment, Employee was walking with large hand tools and wrenched his back.
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, whole body

14. Nature and extent of any permanent disability: 20% permanent partial disability of the whole body
15. Compensation paid to date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? \$18,765.12
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$1,092.00
19. Weekly compensation rate: \$728.04/\$404.66
20. Method wages computation: By stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable: 80 weeks @ \$404.66 = \$32,372.80
22. Second Injury Liability: N/A

**TOTAL: \$32,372.80**

23. Future requirements awarded: N/A

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of Stephen Mayer, Employee's attorney, for necessary legal services rendered.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Smith Injury No. 08-098439  
Dependents: N/A  
Employer: Roberts Dairy Company, LLC  
Insurer: Fidelity & Guaranty Insurance/Broadspire Services, Inc.  
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund (Dismissed)  
Hearing Date: October 2, 2013 Checked by: MSS/pd

This case comes for hearing before Administrative Law Judge Siedlik in Kansas City, Missouri on October 2, 2013. Missouri has jurisdiction to hear this case pursuant to §287.110. The Claimant, Mr. Hugh David Smith (hereinafter Employee), appeared in person and with counsel, Mr. Stephen C. Mayer. The Employer, Roberts Dairy Company, LLC, appeared through its counsel, Mr. Brian Fowler.

The issues to be resolved include the nature and extent of disability and the Claimant's need for medical care.

The evidence at trial consisted of the testimony of the Claimant in person as well as his sister, Ms. Esther Hinkle, together with Claimant's Exhibits C through L and Employer/Insurer's Exhibits 1 through 10 but Employee withdrew No. 6 and No. 7. The Claimant had marked and offered Exhibits A and B which were objected to and excluded from evidence. Claimant's Exhibit A is a medical addendum by Dr. P. Brent Koprivica dated February 21, 2010 and Claimant's Exhibit B is the vocational report of Mr. Michael Dreiling dated February 9, 2010. The Employer and Insurer objected to Claimant's Exhibit B, there being no agreement to submit the testimony of Mr. Dreiling in lieu of his deposition testimony which was not taken, and Claimant's Exhibit B was excluded. Claimant's Exhibit A was an addendum report by P. Brent Koprivica in which his opinion mirrored that of Mr. Dreiling adopting Mr. Dreiling's vocational assessments as his own opinion and is merely a hearsay attempt to bring before the Court the vocational assessment of Mr. Dreiling which was properly objected to and withheld.

Thereafter, the parties entered certain stipulations including:

- 1) That Roberts Dairy Company, Inc., was an employer operating subject to the Missouri workers' compensation law with its liability fully insured by Fidelity & Guaranty Insurance Company;
- 2) That Mr. Smith was its employee subject to the law working in Independence, Jackson County, Missouri;
- 3) That Mr. Smith sustained an injury by accident within the course and scope of his Employment on or about October 17, 2008;

- 4) That Mr. Smith notified the employer of his accident and filed his claim for compensation in a timely manner;
- 5) That the Claimant's average weekly wage is \$1,092 per week;
- 6) That the Claimant's average weekly wage is sufficient for a compensation rate of \$404.66 for permanent partial disability and \$728.04 for permanent and total disability.

Claimant testified that he is currently 60 years old and at the time of his injury was employed at Roberts Dairy as a stationary operating engineer. The Claimant had worked in this capacity for prior employers including Station Casino and the Americana Casino as well as Wonder Bakery. The Claimant testified his work throughout his career essentially was much the same and involved maintaining and repairing various pieces of equipment used in the processing of material. The Claimant testified he worked with all energy handling systems including boilers, chillers, pumps, air compressors, hydraulic pumps and pneumatics. Claimant testified he was required to use various types of tools including drills, grinders, welders, concrete drills and saws and he worked from ladders, catwalks and scaffolding. The Claimant testified his job duties frequently entailed lifting in excess of 30 pounds and included overhead work and work in awkward positions.

The mechanism of injury is not in dispute, but the Claimant testified on October 17<sup>th</sup>, he was working with a 36-inch pipe wrench which slipped, causing him to jerk backwards and injuring his back. Claimant testified to immediate searing pain in the middle of his back which radiated down his leg. The Claimant promptly reported the accident to his supervisor and was provided authorized treatment which began at Shawnee Mission Medical Center.

The Claimant was initially seen by Dr. Jackson who did not recommend surgery because of the risks involved but recommended ongoing pain management and epidural injections. The Claimant was provided work hardening under the supervision of Dr. Zarr. The Claimant testified the work hardening was quite difficult and the resulting Functional Capacities Examination results were less than optimal.

The Claimant on cross-examination admitted a prior injury to his thoracic spine in a diving board accident resulting in a compression fracture. The Claimant's own medical expert, Dr. Koprivica, noted the Claimant had a 20 percent compression deformity in the thoracic spine and noted chiropractic treatment for a number of years predated the Claimant's current injury. The Claimant admitted that he continued with ongoing back pain as a result of the prior compression fracture. The Claimant further admitted a similar thoracic injury in a prior work-related event at Ameristar Casino where the Claimant was diagnosed with thoracic sprain, possible compression of the T12 vertebra and degenerative joint disease.

The Claimant was examined by Dr. Zarr for the Employer and Insurer after initially starting treatment with Dr. Jackson. Dr. Zarr released the Claimant from care March 18, 2009 and assigned a permanent partial disability of 9 percent of the whole body referable to a thoracic sprain. Prior to the rating by Dr. Zarr, the Claimant was given a Functional Assessment by Mr. Ryan Clark and Mr. Clark noted in his observations that Mr. Smith gave an invalid effort. Mr. Clark did note, however, that even with the less than optimal effort the Claimant was able to lift 60 pounds occasionally, push 50 pounds of force and carry 20 pounds with the right and 30 pounds with the left hand.

The Claimant was examined by Dr. P. Brent Koprivica who noted in his report that the Claimant had a 20 percent deformity pre-existing his work-related accident. Dr. Koprivica took a history of the Claimant's accident, reviewed his treatment and past conditions and performed his examination. Dr. Koprivica noted at the time of his examination, Claimant was taking no medications and was engaged in self-directed water therapy. Dr. Koprivica was of the opinion the Claimant had a 25 percent permanent partial disability to the spine referable to the thoracic spine. Dr. Koprivica in his initial report suggested the Claimant see a vocational expert, but "I would expect him to be employable within the restrictions I've outlined." The Claimant was, in fact, seen by a vocational expert whose report was excluded from evidence. Dr. Koprivica subsequently authored an addendum report which adopted as his own opinion the vocational assessments of Mr. Dreiling; the Employer and Insurer objected to Dr. Koprivica's addendum report and that objection was sustained.

Claimant testified he currently lives alone and has since 2004. Claimant is self-sufficient, able to meet all of his activities of daily living and take care of his home; although, Claimant indicated his daughter and sister help him with some home activities. The Claimant is able to drive. The Claimant testified he has several years of college education and asserted he has a very high IQ which is far above average. The Claimant has post-high school electronic trade school education and certifications. Claimant has been employed as a supervisor and has trained other individuals and is able to read blueprints and schematics. The Claimant was also self-employed for a period of time involved in electrical repairs.

The Claimant testified after his October 17, 2008 injury he continued to work for his employer until March of 2009 and once his work ceased, he applied for and received unemployment benefits through October 2009. At the termination of the Claimant's 26 weeks of unemployment benefits, the Claimant has not looked for employment in the past three years. The Claimant testified that he believes he is unable to compete in the open labor market and has not looked for work. The Claimant confirmed that he takes no medications other than occasional over-the-counter medications and has not had treatment for a period of years.

## FINDINGS

After careful consideration of all the evidence and testimony presented including the medical testimony submitted by both parties, I find the Claimant has, as previously stipulated to, sustained an injury by accident arising out of and in the course and scope of his employment on October 17, 2008. The Claimant in that injury suffered permanent injuries to his thoracic spine for which I find the Claimant now has a permanent partial disability of 20 percent of the whole person referable to the thoracic spine. I find the Claimant has failed to meet his burden of proof to establish any need for ongoing medical treatment and note the only thing the Claimant does to relieve the effects of his injury is self-directed water therapy.

The Claimant by his own admission concedes very high intellect and past work as a supervisor and trainer together with certification in electronics and a past history of self-employment with contact with the public. Claimant has no limitation on restriction of ability to perform sedentary tasks and, in fact, applied for and received unemployment benefits for a period of 26 weeks after which the Claimant removed himself from the labor market.

The Claimant has received no medical treatment since March of 2009 and takes no pain medication at this time.

The Claimant offered the vocational report of Mr. Michael Dreiling which was objected to because of the lack of the expert's testimony and precluded from evidence. The Claimant also offered an addendum report from Dr. Koprivica where the doctor assumes as true the opinions of the vocational expert in his report. However, since the vocational report was not received into evidence, Dr. Koprivica's addendum was objected to and not admitted as part of the record. Bruflat v. Mr. Guy, Inc., 933 SW 2d 829 (Mo. App. 1996).

The Claimant has met his burden his proof to establish a permanent partial disability representing 20 percent of the whole person referable to the thoracic spine and is entitled to 80 weeks of compensation at \$404.66 per week, a total of \$32,372.80. The Claimant's counsel, Mr. Stephen Mayer, is entitled to attorney's fees of 25 percent of sums recovered for his legal services rendered. There is no award warranted for future medical care and none is provided.

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

**Mark Siedlik**

*Administrative Law Judge  
Division of Workers' Compensation*