

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

Injury No.: 03-084065

Employee: Earl Talbert
Employer: Curators of University of Missouri
Insurer: Self-Insured/Thomas McGee LC
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 17, 2003
Place and County of Accident: Columbia, 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 February 16, 2007. The award and decision of Administrative Law Judge Robert J. Dierkes, issued February 16, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 18th day of October 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

SEPARATE OPINION FILED

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

SEPARATE OPINION
CONCURRING IN PART AND
DISSENTING IN PART

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my

review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified to deny employee permanent partial disability benefits for his bilateral shoulder impingement syndrome. I agree with all other portions of the administrative law judge's award.

I do not believe that employee's bilateral shoulder impingement syndrome is related to the work accident of July 17, 2003. First, in his award, the administrative law judge incorrectly asserts that employee was doing overhead work on July 17, 2003. The description given by employee regarding the work he was performing at the time of the accident shows that he was standing above the steel grates. After using a concrete saw to cut around the grates, employee then bent over and began striking the grates from the side with a hammer in order to break the grates loose from the concrete. Thus, employee was not performing overhead work at the time of his work injury. Hence, the administrative law judge's opinion that the work accident was a substantial cause of employee's bilateral shoulder impingement syndrome is flawed.

Second, employee failed to mention any shoulder injuries in his original claim for compensation filed on January 21, 2004, or in his first amended claim filed on August 6, 2004. It was not until he filed his second amended claim on January 18, 2005, eighteen months after the work accident and a month after his shoulder surgery, that employee alleged his shoulders were injured in the work accident.

Third, employee's medical records do not show that he experienced any shoulder problems after the work accident until August 24, 2004. The only time employee's shoulders are mentioned in his medical records prior to August 24, 2004, is when doctors describe the area throughout which his back pain radiates. None of these references deal with actual pain from or injuries to his shoulders.

Employee's left shoulder was x-rayed on August 30, 2004 and it was determined that there was a tumor or lesion present. An MRI of his left shoulder on September 20, 2004, further revealed that there was a small tear in employee's rotator cuff. X-rays of his right shoulder were performed on September 8, 2004. Dr. Sethi reviewed those x-rays and determined that degenerative changes were present, along with a round dense lesion between the right sixth and seventh ribs. Dr. Conway, who treated employee during a seventeen day stay at Rusk Rehabilitation for pain management, opined that employee's shoulder problems were "outside" of his workers' compensation claim. Dr. Kane's records from December 22, 2004, indicate that employee had been experiencing bilateral shoulder pain "for many years." Dr. Behrouzi-Jareh's records from April 15, 2005, show that employee's shoulder pain became worse after he fell and caught himself with his arms.

Dr. Cantrell provided the most credible and persuasive evidence regarding employee's shoulder problems. Dr. Cantrell was extremely knowledgeable about employee's medical history and displayed this in both his medical report and deposition testimony. He opined that employee's bilateral shoulder impingement syndrome was not related to the work accident because the medical records did not indicate that employee was having shoulder problems after the accident, employee had previously been diagnosed with shoulder impingement syndrome, and employee was not performing overhead work at the time of the work accident. I agree with Dr. Cantrell's opinion in its entirety.

The only evidence linking employee's shoulder problems to the work accident of July 17, 2003, is that of employee's expert medical witness, Dr. Sparks. Dr. Sparks did not examine employee until July 6, 2005, nearly two years after employee's work accident. I do not believe his testimony and opinion to be persuasive. Dr. Sparks was completely unfamiliar with employee's medical history, prior injuries and prior disabilities. Without regard to those injuries, including employee's prior right shoulder surgery, Dr. Sparks found that the work accident was a substantial cause of employee's bilateral shoulder problems. Clearly, Dr. Sparks could not find that the work accident was a substantial cause of employee's bilateral shoulder problems if he was unaware that the problems may have pre-existed the work accident.

Thus, based on all of the above evidence, I do not believe that the work accident of July 17, 2003, was a substantial cause of employee's bilateral shoulder impingement syndrome. As such, employer should not be liable to employee for permanent partial disability benefits for his right or left shoulder as a result of the work accident.

For the foregoing reasons, I respectfully dissent from that portion of the decision of the majority of the Commission

to allow compensation for employee's shoulder injuries.

Alice A. Bartlett, Member

AWARD

Employee:	Earl Talbert	Injury No.	03-084065
Dependents:		Before the	
Employer:	Curators of University of Missouri	DIVISION OF WORKERS'	
Additional Party:	Second Injury Fund	COMPENSATION	
Insurer:	Self-insured/Thomas McGee LC	Department of Labor and Industrial	
Hearing Date:	November 13, 2006	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	RJD/cs

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: July 17, 2003.
5. State location where accident occurred or occupational disease was contracted: Columbia, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment?
Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: (See below.)
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, both shoulders.
14. Nature and extent of any permanent disability: 35% body as a whole with/re to low back, 10% ppd right shoulder, 9% ppd left shoulder.
15. Compensation paid to-date for temporary disability: \$28,750.69 (paid through 10/24/04).
16. Value necessary medical aid paid to date by employer/insurer? \$187,268.67
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages: \$654.80.

19. Weekly compensation rate: \$436.56 ttd/ptd - \$347.05 ppd.

20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:

184.08 weeks of permanent partial disability from Employer (minus credit of \$249.46) = \$63,635.50

Mileage \$101.43

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential \$89.51 payable by SIF for 184 1/7 weeks beginning October 21, 2004,
and, thereafter \$436.56 weekly for Claimant's lifetime

TOTAL:

23. Future requirements awarded: Employer is also required to provide Employee with future medical benefits, all as set forth more fully below.

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

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

Dennis Murphy

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Earl Talbert

Injury No: 03-084065

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents:

Employer: Curators of University of Missouri

Additional Party Second Injury Fund

Insurer: Self-insured/Thomas McGee LC

Checked by: RJD/cs

ISSUES DECIDED

The evidentiary hearing in this case was held on November 13, 2006 in Jefferson City. The parties requested leave to file post-hearing briefs, which leave was granted. The case was submitted on December 21, 2006. The hearing was held to determine the following issues:

1. Whether Employer shall be entitled to a credit for alleged overpayment of temporary total disability ("TTD") benefits;
2. Whether Employer shall be liable for permanent partial disability benefits or permanent total disability benefits, and the amount thereof;
3. The liability of the Second Injury Fund, if any, for permanent total disability benefits;
4. Whether Employer shall be ordered to reimburse Claimant for medical expenses he has sustained for treatment of his shoulders;
5. Whether the work accident of July 13, 2003 is the medical and legal cause of the injury to either or both shoulders;
6. Whether the notice requirement of §287.420 is a bar to Claimant's claim for compensation in regard to his alleged shoulder injuries; and
7. Whether Employer shall be ordered to provide future medical benefits pursuant to §287.140.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue for the evidentiary hearing is proper in Boone County and adjoining counties, and that Cole County is an adjoining county to Boone County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That the compensation rates are \$436.56/\$347.05, based on an average weekly wage of \$654.80;
6. That Claimant, Earl Talbert, sustained an accident arising out of and in the course of his employment with University of Missouri on July 17, 2003;
7. That University of Missouri is an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times;
8. That Employer owes Claimant \$101.43 for mileage;
9. That Claimant is permanently and totally disabled under the Missouri Workers' Compensation Law;
10. That Employer paid temporary total disability ("TTD") benefits of \$28,750.59, representing payments from July 21, 2003 through October 24, 2004; and

11. That Employer-Insurer paid medical benefits in the amount of \$187,268.67.

EVIDENCE

The evidence consisted of the testimony of Claimant, Earl Talbert; medical records; photographs which represent the "positive" of Claimant's x-rays; the reports and deposition testimony of Dr. Robert Sparks; the reports and deposition testimony of Dr. Russell Cantrell; medical bills; record of payments made by Employer; portions of the file of the Missouri Division of Workers' Compensation in this case; and portions of the file of the Missouri Division of Workers' Compensation in Claimant's prior cases.

FINDINGS OF FACT AND RULINGS OF LAW

I find that Claimant, Earl Talbert, was born September 9, 1956, has an eleventh grade education, and has no other education and training, other than training he received in the U. S. Army, where he served for two years as a mechanic. I find that Claimant began working for the University of Missouri ("Employer") in April 1994, and that Claimant's job title while working for Employer was "mason". The majority of Claimant's work for Employer was related to laying bricks and concrete blocks, tuckpointing and concrete work; i.e., work generally associated with a mason. When there was no masonry work, Claimant would work as a laborer, helping electricians or plumbers.

I find that Claimant's work history prior to his employment with Employer included working for Columbia Curb & Gutter. According to Claimant, his work for Columbia Curb & Gutter consisted of "concrete work", which he further described as "generally pouring highways". After leaving Columbia Curb & Gutter, Claimant went to work for Cook Construction, where he worked for a few years.

The parties stipulated that Claimant sustained an accident arising out of and in the course of his employment with the University of Missouri on or about July 17, 2003, and that subsequent to that injury Claimant is now permanently and totally disabled for workers' compensation purposes; the obvious primary issue in the case being whether the responsibility for lifetime weekly permanent partial disability benefits lies with Employer or with the Second Injury Fund.

I find that, prior to July 17, 2003, Claimant had sustained a number of injuries, some of which required surgery, and Claimant also required surgery on his brain stem for Chiari malformation. There are no medical records in evidence regarding the brain stem surgeries, and there was no evidence adduced to indicate that the Chiari malformation itself, or the surgeries to address them, resulted in any permanent disability. There are medical records, as well as records from the Missouri Division of Workers' Compensation, regarding several injuries Claimant sustained prior to July 17, 2003. In May 1988, Claimant sustained a hernia while working for Columbia Curb & Gutter. There was no evidence that this hernia resulted in any permanent disability. In August 1988, Claimant's right elbow became quite infected as a result of repeated and ongoing exposure to concrete while working for Columbia Curb & Gutter. The workers' compensation case for Claimant's right elbow (Injury No. 88-182725) was settled for 5% permanent partial disability of the right elbow.

I find that in December 1989, Claimant sustained a low back injury while working for Columbia Curb & Gutter. As a result of this injury, Claimant required surgery, consisting of L5-S1 foraminotomy and discectomy. Dr. Dennis Abernathie, Claimant's surgeon, rated Claimant's permanent disability at 20% of the body as a whole. The workers' compensation case for this back injury (Injury No. 89-169260) was settled for 27.5% permanent partial disability of the body as a whole. I find that, as a part of his rehabilitation for the December 1989 low back injury, Claimant underwent a "work hardening program"; on September 11, 1990, while engaged in the "work hardening program", Claimant injured his left knee. Claimant filed a Claim for Compensation against Columbia Curb & Gutter for his left knee injury. The workers' compensation case for Claimant's left knee (Injury No. 90-167184) was

settled for 5% permanent partial disability of the left knee.

I find that, subsequent to the work hardening program, Claimant did not return to work for Columbia Curb & Gutter, and was referred to Vocational Rehabilitation. After a period of rehabilitation, Claimant began work for Cook Concrete Construction in June 1992. I find that in August 1992, Claimant sustained an injury while working for Cook Concrete Construction when a uniloader backed over his lower right leg. The workers' compensation case for Claimant's lower right leg (Injury No. 92-157482) was settled for 5% permanent partial disability of the right knee. I find that in November 1993, apparently while working for Cook Concrete Construction (although no report of injury or claim for compensation was filed with the Division of Workers' Compensation), Claimant fell off of a roof, fracturing both wrists and injuring his left knee (a significant tear of the medial meniscus, for which Claimant underwent surgery).

I find that in October 1996, while working for Employer, Claimant sustained an injury to his right shoulder, for which he had surgery. While this injury has been described in Claimant's testimony and in Dr. Sparks' testimony as a rotator cuff tear, it is apparent that there was no cuff tear, but that Claimant had an impingement syndrome, and that the surgery consisted of a subacromial decompression and acromioplasty. The workers' compensation case for Claimant's right shoulder (Injury No. 96-124990) was settled for 16% permanent partial disability of the right shoulder. Also in Injury No. 96-124990, Claimant settled with the Second Injury Fund for permanent partial disability benefits, with the prior disability being the "low back". I find that in September 2000, while working for Employer, Claimant hit his head on a low-hanging pipe, causing injury to his head and neck. The workers' compensation case for that injury (Injury No. 00-127027) was settled for 5% of the body as a whole.

I find, as stipulated, that Claimant sustained an accident arising out of and in the course of his employment with the University of Missouri on or about July 17, 2003. I find that this accident occurred as Claimant was in the process of removing several floor drain coverings, which were basically large steel grates, from a concrete floor in an area where cows and hogs were kept. The object of the job was to remove the grates by use of concrete saw, pry bar and sledgehammer, and filling the drains with concrete. Claimant removed three of the grates on July 16, 2003 and the remaining six on July 17, 2003. Claimant estimated that each grate weighed about 300 pounds. Also on July 17, 2003, Claimant and a co-worker had to lift each of the nine grates from a dock onto a truck. Claimant testified that the level of the truck bed was approximately two feet higher than the dock. I find that Claimant injured his back while lifting the grates. Nevertheless, on July 18, 2003, Claimant returned to work and spent the day wheeling barrows of concrete into the building to fill the drains and the holes left by the removal of the grates. Claimant testified that his back and shoulders were hurting the entire day on July 18, 2003. As discussed further below, Claimant now alleges that he also injured both of his shoulders on or about July 17, 2003.

Claimant almost immediately came under the care of Dr. R. Ray Cunningham of Columbia Orthopaedic Group. An MRI done on July 28, 2003 showed a slight bulging disc at L4-5, a collapse of the disc space at L5-S1 and degenerative changes. On September 25, 2003, Dr. Cunningham performed an anterior L5-S1 fusion with instrumentation. Because of continuing complaints additional diagnostic testing was done, a second opinion examination was done by Dr. Garth Russell, and Claimant proceeded to have a second surgery done by Dr. Cunningham on March 16, 2004, consisting of a posterior fusion from L3 to S1 with instrumentation. Employer authorized and paid for all treatment to Claimant's back. Dr. Russell Cantrell, who evaluated Claimant at the request of Employer on May 3, 2006 contends that the work accident of 7/17/03 is not the cause of the need for the 3/16/04 surgery, and Employer now so contends in its post-hearing brief. I find that this is merely an attempt to re-write history, and I specifically find that both surgeries done by Dr. Cunningham were necessitated by the work accident of July 17, 2003. Drs. Cunningham and Russell both so believed, as did Dr. Robert Heim, a neurosurgeon, who saw Claimant for a "third opinion" on June 16, 2004 and on December 3, 2004.

I find that subsequent to his back surgeries, Claimant had surgery on his right shoulder on December 22, 2004, consisting of a diagnostic arthroscopy and distal clavicle resection. On November 1, 2005, Claimant had a similar surgery on his left shoulder. I find that the original claim for compensation herein, filed by Claimant on January 21, 2004, does not mention any shoulder injuries, just "spine with symptoms radiating to both legs". Likewise, the amended claim filed in August 2004 makes no mention of the shoulders; the amended claim merely changed the allegations from "permanent partial disability" to "permanent total disability". The second amended claim for compensation, filed on January 18, 2005, includes the allegation of "bilateral shoulders".

ISSUE: SHOULDERS (CAUSATION)

The first issue to be addressed is whether there was any injury to the shoulders in the July 17, 2003 accident. There is no question that Claimant sought treatment for his shoulders in late 2004 and in 2005, and that the surgeries were performed. The post-surgical diagnosis for each shoulder was “impingement syndrome”, and the surgical procedures were consistent with that diagnosis.

Dr. Robert Sparks, who evaluated Claimant on June 28, 2005 at the request of Claimant’s attorney, testified generally to his belief that the shoulder surgeries were necessitated by the work accident of July 17, 2003, and that Claimant sustained permanent partial disability to each of his shoulders as a result of the work accident of July 17, 2003. While Dr. Sparks did not testify at any length concerning the *basis* of his opinion regarding the shoulders, the inference is that it is due to the history Claimant gave him of shoulder pain post-accident. Dr. Russell Cantrell, who evaluated Claimant on May 3, 2006 at the request of Employer’s attorney, testified that the bilateral shoulder problems for which Claimant subsequently underwent surgery were not caused by the 7/17/03 accident. Dr. Cantrell testified that there were basically three reasons for his opinion. The first reason was that “I didn’t find any mention (in the medical records) that as a result of those activities he was also having shoulder pain complaints in addition to his low back and lower extremity symptoms.” (Exhibit D, page 35). “In other words, if there’s not complaints of acute onset of shoulder pain after doing those activities, there’s certainly not a cause and effect relationship that you might expect to see with an activity and a symptom.” (Exhibit D, page 60) The second reason was “as I recall he has had a prior – at least right shoulder surgery and either from my review of the records or his history had had some mild residual symptoms in his right shoulder as well.” (Exhibit D, page 35). The third reason was that, to Dr. Cantrell’s knowledge, Claimant was “not doing any overhead work” on July 16-18, 2003. (Exhibit D, page 59).

There are, in fact, numerous mentions in the medical records of Claimant complaining of shoulder pain; however, they were not the *primary* concern of either Claimant or the physician – the back was the primary concern – but later, after the back had been addressed, the shoulders came to the forefront of Claimant’s concerns. On cross-examination, Dr. Cantrell agreed that it is common in patients having “major trauma and multitrauma” for “the lesser traumas (to be) overlooked or placed on the back burner, either by patient or treating physician”. (Exhibit D, page 37).

It is true that Claimant had a prior right shoulder surgery. This, of course, has nothing to do with Claimant’s *left* shoulder problems, nor does it preclude a reinjury to the right shoulder.

The history is that Claimant was doing overhead work on July 16-18, 2003. He was using a sledgehammer to dislodge the grates from the concrete. He was also using prybars to accomplish this task.

I find that the work accident of July 17, 2003 was a substantial factor in the cause of the bilateral shoulder impingement syndrome.

ISSUE: SHOULDERS -- NOTICE

Employer contends that Employee’s failure specifically to alert Employer to his shoulder injuries invalidates the claim for compensation as to the shoulders only.

Section 287.420 provides:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice. No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty

days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice.

Employer has cited no case law to the effect that a claim for compensation can be *partially* invalidated by a *partial* lack of notice. The wording of the statute (*no* proceedings ... shall be maintained), as well as the existing case law would indicate that the “notice defense” is an “all-or-nothing” defense.

The report of injury in this case was prepared on July 22, 2003, based upon notification made to the administrator on July 21, 2003. “Lack of timely written notice may be excused when there is actual notice to the employer.” *Hall v. G.W. Fiberglass, Inc.*, 873 S.W.2d 297, 298 (Mo. App. E.D. 1994). I find that Employer clearly had actual notice of the “time”, “place” and *general* “nature” of the injury. Failure of Claimant explicitly to mention his shoulders directly to Employer within thirty days of the accident date, in light of his serious back injuries, should not be sufficient to invalidate Claimant’s claim entirely, and there does not appear to be any authority for a partial invalidation of the claim. I find, therefore, that the notice requirement of Section 287.420 does not invalidate Claimant’s claim, in whole or in part.

ISSUE: SHOULDERS – LIABILITY FOR PAYMENT OF MEDICAL BILLS

Section 287.140.1 provides, in part: “If the employee desires, he shall have the right to select his own physician, surgeon or other such requirement at his own expense.”

An employee has the right to employ his own physician at his own expense, and it is only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails and neglects to provide needed treatment, that the employer is held liable for the medical treatment procured by the employee. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 879 (Mo. App. S.D. 1984).

Claimant made Employer aware of his need for back treatment, and Employer provided it – almost \$200,000 worth. I find that Claimant never made Employer aware of his need for medical treatment on his shoulders. Claimant testified that he never made a demand upon Employer for shoulder treatment. Claimant now argues that because he complained of shoulder pain to the authorized physicians, occasionally in the presence of a nurse/case manager, that Employer knew Claimant was in need of medical treatment for his shoulders, that this need was related to the 7/17/03 accident, and that Employer thus failed or refused to provide the treatment. Considering the fact that Claimant’s own attorney did not know of Claimant’s shoulder injuries until January 2005 (as evidenced by the second amended claim filed January 18, 2005), it is difficult to fathom how such knowledge should have been imputed to Employer many months earlier. Therefore, the lack of any demand for shoulder treatment, indeed, the lack of any mention to Employer of shoulder treatment, makes it evident that Claimant was exercising his “right to select his own physician (or) surgeon ... at his own expense.”

I further find that the filing of the second amended claim on January 1, 2005 was not, in and of itself, a demand for medical treatment for the shoulders, for two reasons. First, Claimant had already selected Dr. Steven Kane to perform surgery on his right shoulder, and the surgery had already been performed (on December 22, 2004). Second, while the second amended claim did add the words: “(a)dditionally, bilateral shoulders”, there was nothing else in the claim to indicate that Claimant was then currently in need of treatment for either shoulder, a full eighteen months after the original accident date.

In short, there is no evidence that Claimant’s treatment by Dr. Kane was anything other than Claimant’s exercise of his right to select his own physician or surgeon at his own expense. Employer has no liability for the payment of additional medical bills.

ISSUE: LIABILITY OF EMPLOYER AND/OR SECOND INJURY FUND FOR PERMANENT DISABILITY BENEFITS

The parties stipulated that Claimant is now permanently and totally disabled for workers’ compensation purposes; I must decide whether the responsibility for lifetime weekly permanent partial disability benefits lies with

Employer or with the Second Injury Fund.

Both Dr. Sparks (Exhibit 5, pp. 18-19) and Dr. Cantrell (Exhibit D, pp. 22, 27) agree that Claimant is permanently and totally disabled.

In determining the extent of disability attributable to the employer and the Second Injury Fund, the extent of the compensable injury must first be determined. If the compensable injury, considered alone, results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Roller v. Treasurer*, 935 S.W.2d 739, 741 (Mo. App. S.D. 1996).

Dr. Sparks testified to his belief that the last injury alone was sufficient to cause Claimant's total disability; Dr. Cantrell testified that the last injury alone was not sufficient to cause total disability, but rather the total disability was as a result of a combination of the last injury with the preexisting disabilities.

Dr. Sparks explained the basis for his opinion thus:

In my opinion, the answer to this is that Mr. Talbert was working every day full-time prior to the injury of 7-17-03. Apparently at the time of this injury or just prior to this injury, he was felt capable of lifting heavy doors that weighed 250 to 300 pounds. He was also felt capable and was capable of wheeling wheelbarrows of cement into these areas that were now open as a result of removing the trap doors. ^[1] That tells me that Mr. Talbert was working every day, was gainfully employed. As a result of the injury dated 7-17-03 I believe he is no longer able to be employed. Therefore I believe that his 100 percent disability is directly related to this incident. (Exhibit 5, page 19).

A portion of Dr. Cantrell's testimony on this issue follows:

Q: If you just look at the L5-S1 fusion and then the three-level posterior fusion and laminectomy, those two procedures, and what he's left with after that, do you believe that the combination of those events and the condition they left him in, would that have been sufficient to make him ineligible to reenter the work force?

A. I don't think that alone would.

Q. Okay.

A. But I do think that would have prevented him from returning to an unrestricted capacity. (Exhibit D, pp. 33-34).

Dr. Cantrell also testified as follows:

Q. Do you have an opinion whether his preexisting nonwork-related conditions that you mentioned and combined with his lumbar spine conditions affect his overall employability in the open labor market?

A. It was my opinion that that was the case, yes.

Q. Do you have an opinion whether Mr. Talbert is capable of returning to some form of gainful employment?

A. It was my opinion that he was not likely capable of returning to gainful employment due to a combination of conditions, many of which are orthopedic in nature. (Exhibit D, page 22).

Claimant clearly sustained a significant injury to his back as a result of the 7-17-03 accident. Dr. Sparks opined that Claimant sustained a permanent partial *impairment* of 35% of the "lumbar spine"; Dr. Cantrell opined

that Claimant sustained a permanent partial disability of 27.5% of the body as a whole.^[2] In addition, Claimant sustained injuries to both shoulders in the 7-17-03 accident, which Dr. Sparks rated at a 10% permanent *impairment* of the right shoulder and a 9% permanent *impairment* of the left shoulder. It is certainly possible that an injury of this magnitude could render Claimant permanently and totally disabled. It is my duty to first determine the extent of disability attributable to Employer due to the 7-17-03 injury and it is certainly possible that an injury of this magnitude could render Claimant permanently and totally disabled. Dr. Sparks' testimony certainly justifies such a finding; or does it?

On cross-examination, Dr. Sparks testified:

I believe he is 100 percent disabled because he has now had three or four back surgeries with a fusion, he has also had surgery to both shoulders, and prior to this injury he had surgery to both knees. I believe that this last injury dated 7-17-03 has made it impossible for him to work. (Exhibit 5, page 35).

In this answer, Dr. Sparks has now added the prior knee surgeries into the mix, as well as the prior back surgery.

Dr. Sparks also testified on cross-examination:

Q: And so are you saying that because he always returned to work he did not have any prior disability related to these, or are you saying you just did not have the ability to evaluate that?

A. I am saying that I never saw him prior to July 6, 2005. I really don't know anything about his disabilities prior to that date. I do know that he had injuries, I do know that he had previous knee surgery, but I – as far as whether or not he was disabled I cannot comment because I never examined him prior to July 6, 2005.

This answer makes it clear that Dr. Sparks does not know the extent (if any) of Claimant's previous disabilities, nor has he attempted to ascertain them. As Dr. Sparks has considered the prior knee surgeries and the prior back surgeries into the total disability calculation, but has no idea as to how much weight, if any, to give them, his conclusion that the 7-17-03 accident alone resulted in Claimant's permanent total disability becomes suspect.

I find, therefore, that the 7-17-03 accident alone did not cause Claimant to become permanently and totally disabled. I find that the 7-17-03 accident resulted in a permanent partial disability of 35% of the body as a whole, a permanent partial disability of 10% of the right shoulder and a permanent partial disability of 9% of the left shoulder. This results in 184.08 weeks of permanent partial disability benefits at the stipulated rate of \$347.05, totaling \$63,884.96.

EMPLOYER CREDIT FOR TTD OVERPAYMENT

Employer seeks a credit of \$249.46 for TTD benefits paid from 10/21/04 through 10/24/04, as Claimant was at maximum medical improvement as of 10/20/04^[3]. I find that Employer is entitled to such a credit, which shall be deducted from Employer's liability for permanent partial disability benefits. Therefore, Employer is ordered to pay \$63,635.50 for permanent partial disability benefits (after allowance for the credit).

LIABILITY OF THE SECOND INJURY FUND

I find that Claimant is permanently and totally disabled as a result of the injuries Claimant sustained in the work-related accident of July 17, 2003 in combination with his pre-existing disabilities. I specifically find that the back injury Claimant sustained in December 1989 while working for Columbia Curb & Gutter, which required surgery, was a hindrance or obstacle to employment or re-employment. Claimant and Second Injury Fund argue that, simply because Claimant received a settlement based on a 27.5% disability of the body as a whole for this injury, it does not mean, *ipso facto*, that the disability from the December 1989 accident constituted a hindrance or obstacle to employment or re-employment. Claimant and Second Injury Fund also argue that there is no basis in

the evidence for finding that the disability from the December 1989 accident constituted a hindrance or obstacle to employment or re-employment. I disagree. The evidence showed that Claimant could not return to his work at Columbia Curb & Gutter, due to his back condition. The evidence showed that Claimant was referred to Vocational Rehabilitation. The evidence showed that Claimant did not work again until June 1992. Although that employment was also with a concrete contractor (Cook Concrete Construction), on cross-examination Claimant agreed with Employer's counsel that the work at Cook was not as strenuous as his previous employment. There is no question that the December 1989 back injury constituted a hindrance or obstacle to Claimant's employment or re-employment. Even if I disregard the prior left knee surgery, the prior right shoulder surgery, and the prior bilateral wrist fractures, the disability from the 1989 back injury clearly combines with the disabilities from the 7/17/03 accident to render Claimant permanently and totally disabled; Dr. Cantrell so opined, and this opinion is buttressed by the testimony of Dr. Sparks as quoted above from page 35 of Dr. Sparks' deposition.

I find, therefore, that the Second Injury Fund is liable for permanent total disability benefits for Claimant's lifetime, beginning October 21, 2004. For the first 184 1/7 weeks, the Second Injury Fund's liability is limited to \$89.51 per week, which is the difference between the permanent total disability rate of \$436.56 and the permanent partial disability rate of \$347.05, payable by Employer for those weeks.^[4] Thereafter, the liability of the Second Injury Fund is \$436.56 per week.^[5]

CLAIM FOR FUTURE MEDICAL BENEFITS

Claimant is requesting an order of future medical benefits from Employer. In *Dean v. St. Luke's Hospital*, 936 S.W.2d 601 (Mo. App. W.D. 1997), the Western District Court of Appeals stated (at 603):

The standard for proof of entitlement to an allowance for future medical treatment cannot be met simply by offering testimony that it is "possible" that the claimant will need future medical treatment. (Citation omitted.) Neither is it necessary, however, that the claimant present conclusive evidence of the need for future medical treatment. (Citation omitted.) To the contrary, numerous workers' compensation cases have made clear that in order to meet their burden claimants such as Ms. Dean are required to show by a "reasonable probability" that they will need future medical treatment.

Claimant is currently under the care of Dr. Jacqueline Ruplinger. Dr. Ruplinger's medical records were in evidence, and indicate that she is seeing Claimant on a monthly basis, that Claimant is being prescribed pain medications, and that he is expected to be on pain medications for the foreseeable future due to back pain.

In his deposition testimony, Dr. Cantrell testified that such medication regimen was reasonable "particularly given the multilevel fusion he's undergone". (Exhibit D, page 40).

Claimant has met the standard for proof of entitlement to an allowance for future medical treatment. Employer is ordered to provide prescription medication to relieve Claimant from his back pain as well as medical monitoring of the medication, as required by Section 287.140, RSMo.

EMPLOYER'S LIABILITY FOR ADDITIONAL MILEAGE REIMBURSEMENT

As stipulated, Employer is ordered to pay Claimant the sum of \$101.43 for mileage reimbursement.

Claimant's attorney, Dennis Murphy, is allowed 25% of all sums awarded (including future sums) as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon.

Interest shall accrue as per applicable law.

A true copy: Attest:

/s/Patricia "Pat" Secrest
Patricia "Pat" Secrest, Director
Division of Workers' Compensation

[1] Dr. Sparks' reference to "doors" and "trap doors" is clearly a reference to the heavy metal gates covering the large floor drains, which were the subject of Claimant's work on July 16-18, 2003.

[2] As noted above, Dr. Cantrell opined that the second surgery performed by Dr. Cunningham – the L3 to S1 posterior fusion – was not attributable to the 7-17-03 accident, an opinion which I specifically reject and is simply not supportable by the evidence as a whole. Dr. Cantrell opined that he "attributes" a 12% body as a whole disability to the 7-17-03 accident and an additional 15.5% to the "multilevel lumbar fusions which he has undergone subsequently"; I must combine the 12% and the 15.5% to arrive at the total actual disability assigned by Dr. Cantrell.

[3] This is the date that Dr. Cunningham released Claimant from his care for the back injury. Claimant began seeking treatment on his own for his shoulders shortly thereafter. No alternative maximum medical improvement date has been suggested by any party, and, indeed, Claimant states in his post-hearing brief that he agrees with the 10/20/04 date of maximum medical improvement.

[4] Employer is ordered to pay 184.08 weeks of permanent partial disability benefits; I have rounded up to 184 1/7 weeks in calculating the weekly differential payments. Unless Claimant dies prior thereto, the last date of the differential payments would be May 8, 2008.

[5] Unless Claimant dies prior thereto, the first date of the \$436.56 weekly payments is May 9, 2008.