

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

Injury No.: 07-105836

Employee: Eddie L. Thompson  
Employer: ICI American Holding f/k/a National Starch & Chemical  
Insurer: Old Republic Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 19, 2009. The award and decision of Administrative Law Judge Robert B. Miner, issued June 19, 2009, 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 16<sup>th</sup> day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

---

William F. Ringer, Chairman

---

Alice A. Bartlett, Member

---

John J. Hickey, Member

Attest:

---

Secretary

AWARD

Employee: Eddie L. Thompson

Injury No.: 07-105836

Employer: ICI American Holding f/k/a National Starch & Chemical

Insurer: Old Republic Insurance Company

Additional Party: The Treasurer of the State of Missouri as Custodian of the Second Injury Fund

Hearing Date: March 23, 2009

Checked by: RBM

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 20, 2007.
5. State location where accident occurred or occupational disease was contracted: North Kansas City, Clay 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: Employee was putting a belt on a machine when his right hand was pulled between the belt and a pulley, causing injury to his right hand.

12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Right hand.
14. Nature and extent of any permanent disability: 55% to the right upper extremity at the wrist (175 week level.)
15. Compensation paid to-date for temporary disability: \$11,372.76.
16. Value necessary medical aid paid to date by employer/insurer? \$13,991.90.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: An amount sufficient to result in maximum compensation rates.
19. Weekly compensation rate: \$742.72 per week for temporary total disability and \$389.04 per week for permanent partial disability.
20. Method wages computation: By agreement of the parties.

#### COMPENSATION PAYABLE

21. Amount of compensation payable from Employer:

Temporary total disability underpayment from Employer (see Award): \$728.01 after reduction of 37.5% safety violation penalty.

96.25 weeks of permanent partial disability from Employer: \$23,403.19 after reduction of 37.5% safety violation penalty.

4 weeks of disfigurement from Employer: \$972.60 after reduction of 37.5% safety violation penalty.

Employer/Insurer has paid \$13,991.90 in medical aid. Employer/Insurer's liability for medical benefits should be reduced \$5,246.96 for the 37.5% safety violation penalty. Employer/Insurer is awarded a credit of \$5,246.96 from the total additional benefits awarded. The total benefits awarded Claimant for temporary total disability, permanent partial disability, and disfigurement are \$25,403.80 after reduction of the 37.5% safety violation penalty. Claimant's award is reduced by \$5,246.96 for the medical benefits credit, leaving a total net due Claimant from Employer of the sum of \$19,856.84.

**TOTAL FROM EMPLOYER: \$19,856.84**

22. Second Injury Fund liability: Not determined. Employee's claim against the Second Injury Fund remains open.

23. Future requirements awarded: None.

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: Wilson Stafford.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Eddie L. Thompson

Injury No.: 07-105836

Employer: ICI American Holding f/k/a National Starch & Chemical

Insurer: Old Republic Insurance Company

Additional Party: The Treasurer of the State of Missouri as Custodian of the Second Injury Fund

Hearing Date: March 23, 2009

Checked by: RBM

## PRELIMINARIES

A final hearing was held in this case on Employee's claim against Employer on March 23, 2009 in Gladstone, Missouri. Employee, Eddie L. Thompson, appeared in person and by his attorney, Wilson Stafford. Employer, ICI American Holding f/k/a National Starch & Chemical, and Insurer, Old Republic Insurance Company, appeared by their attorneys, Samantha Benjamin House and Lara Plaisance. The Second Injury Fund is a party to this case, but was not represented at the hearing since the parties agreed to leave the Second Injury Fund claim open. Wilson Stafford requested an attorney's fee of 25% from all amounts awarded. It was agreed that Briefs would be due on April 6, 2009.

## STIPULATIONS

At the time of the hearing, the parties stipulated to the following:

1. On or about October 20, 2007, Eddie L. Thompson ("Claimant") was an employee of ICI American Holding f/k/a National Starch & Chemical ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about October 20, 2007, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was insured by Old Republic Insurance Company ("Insurer").
3. On or about October 20, 2007, Claimant sustained an injury by accident or occupational disease in North Kansas City, Clay County, Missouri, arising out of and in the course of his employment, and Claimant's injury was medically causally related to an accident or occupational disease on or about October 20, 2007.

4. Employer had notice of Claimant's alleged injury.
5. Claimant's Claim for Compensation was filed within the time allowed by law.
6. The average weekly wage was sufficient to result in maximum compensation rates, and the rate of compensation for temporary total disability is \$742.72 per week and the rate of compensation for permanent partial disability is \$389.04 per week.
7. Employer/Insurer had paid \$11,372.76 in temporary total disability. The first six weeks of temporary total disability benefits were paid at the rate of \$613.36 per week and the next 20.71 weeks of temporary total disability benefits were paid at the rate of \$371.36 per week after Employer/Insurer applied a 50% penalty for an alleged safety violation.
8. Employer/Insurer had paid \$13,991.90 in medical aid. The Court notes that at the beginning of the hearing, the attorneys agreed to leave the record open to verify the amount of medical aid paid. On March 27, 2009, the Court received an email from Wilson Stafford (that was also shown sent to Employer's attorney, and that the Court has had marked "Court's Exhibit 1") stating: "Ms. Benjamin-House and I are now able to stipulate to a paid medical aid total of \$13,991.90."

## ISSUES

The parties agreed that there were disputes on the following issues:

1. Employer's liability for permanent partial disability, including disfigurement.
2. Whether a penalty should be assessed against Claimant's benefits in this case for alleged safety violations, and if so, the extent of the penalty, and Employer's liability for interest on alleged underpaid temporary total disability benefits.

Claimant testified in person at the hearing. Ronald J. Walker, Richard K. Duran, Steven Willets, and Jim W. DeArmund also testified at the hearing. Claimant offered the following exhibits which were admitted in evidence without objection:

- Exhibit A—Medical report of Dr. Bernard Abrams.
- Exhibit B—Curriculum Vitae of Dr. Bernard Abrams.
- Exhibit C—Global SSHE Performance System record.

Employer offered the following Exhibits that were admitted in evidence without objection:

- Exhibit 1—Medical reports, records and Curriculum Vitae of Dr. Dana Towle.
- Exhibit 2—Job Function Analysis.
- Exhibit 3—Maintenance Course Attendance Sheet and other records.
- Exhibit 4—Schematic.
- Exhibit 6—Record regarding training of Claimant.
- Exhibit 7—Photographs.
- Exhibit 8—Personnel document dated May 9, 2008.
- Exhibit 9—Broom handle.

Employer also offered Exhibit 5, Investigation Report. Claimant's counsel objected to Exhibit 5. The objections were sustained, and Exhibit 5 was not admitted in evidence.

On May 6, 2009, the Court discovered that Exhibit 1 appeared to be incomplete and appeared to have missing pages. Attorneys for the parties agreed in conference calls with the Court on May 6, 2009 and May 7, 2009 that omitted pages of Exhibit 1 be sent to the Court and be inserted into Exhibit 1. By agreement of the parties, the record was reopened, and two omitted pages, they being page two of Dr. Towle's report pertaining to his August 11, 2008 examination of Claimant, and page two of Dr. Towle's Curriculum Vitae, were inserted into Exhibit 1 on May 7, 2009. The Fax Transmittal Sheet dated May 7, 2009 from Employer's attorney that accompanied the omitted pages has been marked "Court's Exhibit 2".

The Court observed Claimant's right hand at the trial and assesses four weeks disfigurement for the scarring on his right hand.

### **Findings of Fact**

Based on a comprehensive review of the substantial and competent evidence, including the testimony of the witnesses, the expert medical opinions, the medical records, the exhibits admitted in evidence, the stipulations of the parties, and my personal observations of Claimant at the hearing, I find:

Claimant is 58 years old. He began working for Employer on May 5, 1969. Employer generates a starch product that is mixed in bins and moved by motorized blowers. Claimant usually worked as a mechanic, and had worked as a mechanic since the early 1970s.

On October 20, 2007, Claimant and a co-worker, Ron Walker, were assigned to replace three drive belts on a blending blower. Claimant had changed belts on blending blower motors several times before October 20, 2007. Claimant had the correct belts

when he arrived to do the work. Before they began to replace the belts, they went to the electric room and turned the power off to the electric motor. Mr. Walker put a lock on the device to prevent someone else from starting it up. Mr. Walker also put his tag on it. Claimant did not put his tag on the device when it was locked out.

They next went to where they were to install the new belts. The pulley, or sheave, on one of the blowers was moving. Claimant did not know why it was moving, and did not know if it was getting backflow air. He had not seen the fan blades turn like that before. Claimant testified he was not aware of how to stop the airflow at that time. Neither he nor Mr. Walker shut down the backflow air before the accident. Later, another mechanic told him he should have shut off the air valve. Claimant testified that before the accident, no one had told him to shut off the air valve before changing a belt, and no one had instructed him to do that.

Before installing the belts, Claimant and Mr. Walker tried to stop the pulley from rotating by trying to block it with a broom handle. Claimant had not been trained to do that. He had used a block of wood to stop movement in sheaves before. He said that blocking is an allowed way to do that. Claimant and Mr. Walker did not use lockouts to eliminate the airflow to the blower.

Claimant put one belt on the back side. They stopped turning the pulley and then put the belt on the lower pulley. They rolled the belt around the groove on the lower pulley. The injury occurred when they were attempting to put on the second belt and the machine suddenly moved. Tension on the belt pulled Claimant's gloved right hand into a pulley by the drive belt. His fingers were pinned and cut by the belt and pulley. He jerked his hand out of the machine. The tip of his right small finger was in his glove when he removed his hand. Claimant also injured his right ring and right middle fingers at the time of the accident.

Claimant testified he and Mr. Walker tried to use a pulley adjustment before the accident, but it would not work. They did not adjust the pulleys to shorten the distance between the pulleys to get slack. Claimant testified the adjustments on the pulleys were broken. Claimant identified the pulley adjustment shown in the photographs in Exhibit 7. He said it was similar to the machine he was working on when he was injured. He said the adjustment was bent, rusted, and did not work. He stated that if the pulley adjustment had been working, he could have done the job without being injured. He said he had not been told before the accident that the adjustments were broken. Claimant said he was unable to shorten the distance between the pulleys with the adjustment and had to roll the belts on. He said they tried to do the best job they could. Claimant said he did not knowingly violate any rule at the time of the accident.

Claimant testified that no one really told him to use the pulley adjustment to move the motor closer to put on the belt. He said he knew to do that because that was just the way he always kind of did it. He later testified he did not use the adjustment most of the time that he changed belts. Claimant testified he was trained several times on lock-out and tag-out procedures and other procedures. He stated that, in general, when an electrical source is turned off to the blending blowers, they stop. Sometimes they free wheel five to seven minutes.

Claimant was sent to the North Kansas City Emergency Room immediately after the accident. The tip of his right fourth finger was reattached, and his fingers were stitched. He had physical therapy for a couple of months. Claimant saw Dr. Abrams on January 14, 2008. Dr. Abrams tested his sensation and grip strength.

Claimant testified he did not fully recover from his injury, and he cannot fully extend his fingers. He cannot make a full tight fist and he still has numbness and tingling in his hand. He has trouble holding wrenches and nuts. He testified he has lost strength because of the accident. Claimant stated that prior to the accident, his right hand, which is his dominant hand, had greater strength than his left. He said he had no problems with his right hand before the accident. Claimant agreed he had no permanent restrictions from Dr. Towle. He had no special assistance to perform his job duties after he returned to work following the accident.

Claimant testified that a blocking procedure is a proper lock-out/tag-out procedure according to a lock-out test he took (page 2 Exhibit 3.) Claimant said that a supervisor had told him he could use a piece of wood to block. Before the accident, he had put wood into sheaves on the motor ends of machines.

Claimant would have worked for Employer for forty years in May 2009. He retired from Employer the week before the March 23, 2009 trial in this case. He was given an option to retire or be terminated because of a complaint about his work. Claimant retired in 2009 after he violated Employer's lock-out procedure.

I find that Claimant was a credible witness except as discussed later in this Award.

Ronald Walker testified. He had been a mechanic at Employer for eleven years and had worked for Employer for forty years until the week before the hearing. He said he was forced to retire after an alleged safety violation. On the day of Claimant's accident, he and Claimant were assigned to replace three broken belts on a blending blower. They first went to the electrical room to lock-out the electrical motor. They shut off the power to the motor and locked it out. They then went to the blower to change the belts. They first took the guard or cover off and looked at the adjuster. Mr. Walker said

the pulley adjuster was broken. The bolt on the pulley adjustment had been cut off. He said they could not use it to install the belts.

Mr. Walker noticed the sheave was rotating or moving. It looked like there was a reverse airflow from a vent fan in the bin. He had done a few belt changes before, but none with moving sheaves. Mr. Walker and Claimant stuck a broom handle in the machine to stop it from moving so they could put the belts on. Mr. Walker said there was no other way to stop the movement. Mr. Walker said pages 2 and 3 of Exhibit 3, the lock-out/tag-out test, indicated that blocking machinery could be done.

Mr. Walker testified he had looked for, but had failed to see, a hand valve on the day of the accident. He did not know where the air control valve was at that time. He said after the accident, Employer told him he should have shut off the valve.

Mr. Walker said that if the pulley adjustment had been working, they could have done the job without Claimant being injured. The job would have been easier to do if he had used the air valve shutoff.

Mr. Walker said he had never used a broom handle to stop a machine before October 2007. He was not trained to put a broom handle to stop the movement.

I find that Mr. Walker was a credible witness except as discussed later in this Award.

Richard Duran testified. He is Employer's Security Safety Health and Environmental (SSHE ) Manager. He said there was a hand valve less than twenty feet from where Claimant was injured. It would have taken a matter of seconds to close the valve and stop the backflow air. He could not think of why the valve was not used if Claimant and Mr. Walker knew it was there.

Mr. Duran said blocking a machine does not include shoving wood or a broomstick into the machine. He identified the orange aluminum broken broom handle (Exhibit 9) used by Claimant on the date of the accident. He said shoving a broom handle could cause damage to the machine or injury. A supervisor would not train employees to use a broom handle to do that.

Mr. Duran testified that he inspected the pulley adjustment on the machine that injured Claimant within one-half hour after the accident and the pulley adjustment was not broken. Photographs of the machine, Exhibit 7, were taken. Mr. Duran testified that Mr. Walker was mistaken when he testified the pulley adjustment was not working. He said the machine could have been adjusted prior to the accident to prevent the accident. He testified that the accident was caused by first, not locking out of the electrical source,

next, failure to use the assembly-adjusting as needed, and third, not locking out the air that turned the pulley.

Mr. Duran testified that it is the policy of the Employer to use the pulley adjustment on the machine. He is familiar with training in the maintenance department. Employees are advised to use the adjustment to relieve the stress when changing belts. Mr. Duran did not testify that Claimant specifically was advised to use the adjustment when changing belts.

I find Mr. Duran to be a credible witness.

Steven Willets testified that he is Employer's Maintenance Planner Scheduler. He schedules work. He said that employees are trained to use the adjustment mount for safety. He did not testify that Claimant specifically was trained to use the adjustment when changing belts. When the adjustment is used, the belt does not need to be forced. If you do not adjust the motor, you have to rotate the belt over the sheave which can create a pinch point and cause an injury. He was familiar with Employer's lock-out tag-out procedure. That procedure applies to all energy sources including airflow. Employees are expected to be aware of valves. If a sheave kept turning after an electrical source was turned off, he assumed it would turn because of airflow. You isolate that by shutting the valves or disconnecting the lines. If employees cannot find out where the airflow is, they should contact a supervisor. Mr. Willets has performed training in the past, and has never trained anyone to shove a broom handle or wood into a moving sheave. That would be a safety hazard that could cause injury and damage to a machine.

Mr. Willets testified that question 3 on Exhibit 3 pertaining to blocking to secure a machine did not include putting wood into a machine. It meant putting wood or metal to prevent pieces of machine coming together, and blocking after the energy was gone. He was not personally involved in training Claimant in belt replacement.

I find Mr. Willets to be a credible witness.

Jim DeArmund testified that he is Maintenance Manager for Employer. He was Claimant's supervisor. He testified Claimant had a safety violation as a result of the accident for failing to follow the lock-out tag-out procedure. Mr. DeArmund investigated the accident. Claimant and Mr. Walker never told him there was anything wrong with the pulley adjustment.

Mr. DeArmund testified that he looked at the pulley adjustment immediately after the accident and took photographs, Exhibit 7. He testified there was nothing wrong with the pulley adjustment of the machine that injured Claimant when he inspected it after the accident. He looked for tool marks on the nuts and bolts and saw no tool marks. There

was also a buildup of starch that had been there for a few hours. He concluded the pulley adjustment was not used and no adjustment was tried.

Mr. DeArmund stated that Claimant committed safety violations by failing to place a lock-out tag-out on the motor starter, by proceeding to work without eliminating all sources of energy, and by putting on a belt by rolling it onto the machine. He said that Claimant not stopping the airflow was a contributing factor to the accident. He said there were eleven blowers in the room where Claimant worked, and there were two air control valves less than six feet from where Claimant was working when he was injured. Mr. DeArmund did not testify that Claimant violated a safety rule by failing to adjust the pulley when installing the belt.

I find Mr. DeArmund to be a credible witness.

Exhibit 3 contains materials pertaining to Claimant's training. The first page is a maintenance course attendance sheet dated September 18, 2007. It bears Claimant's signature. It notes category training for safety. Pages 2 and 3 are a lock-out tag-out test dated September 18, 2006. Question 3 of the test states:

LOTO procedures must contain which of the following procedural steps?

- a. Shutting down equipment
- b. Isolating energy
- c. Blocking/securing machinery
- d. All of the above.

Answer "d." was circled. The upper right hand corner of the test had the word, "passed". No answer was noted to be incorrect.

Exhibit 3 contains materials pertaining to Employer's safety rules. It includes a page titled, "Six Steps of Lock-out/Tag-Out." That sheet states: "There are six important steps that must be followed to correctly lock-out/tag-out equipment: 1. Notification-identification; 2. Shut down; 3. Energy isolation; 4. Lock/tag; 5. Relieve storage/residual energy; 6. Test/verify equipment." Another page of Exhibit 3 is titled "Shut Down" and states: "The machine or equipment shall be turned off or shut down using the procedures established for the machine or equipment." Another page in Exhibit 3 is titled "Energy Isolation". It states: "All energy isolating devices that are needed to control the energy to the machine or equipment shall be physically located and operated in such a manner as to isolate the machine or equipment from the energy source(s)." Another page in Exhibit 3 is titled "Lock-out/Tag-out." It states: "Lock-out or tag-out devices shall be affixed to each energy isolating device. Shall be affixed so that it will hold the energy isolating

devices in a 'safe' or 'off' position. Tag-out devices shall be affixed at the same location where the energy isolating device or lock is attached.”

Exhibit 3 also contains a page titled “Relieve Storage/Residual Energy”. It includes the sentence: “All potentially hazardous stored or residual energy shall be relieved, disconnected, restrained, and otherwise rendered safe.” Exhibit 3 also includes a page titled “Test/Verification of Isolation” that states further: “The authorized employee shall verify that isolation and de-energization of the machine or equipment have been accomplished. Now, you can begin working on equipment!” Exhibit 3 also includes a page titled “Group Lock-out/Tag-out” that states: “If more than one person is performing work on the equipment that requires lock-out/tag-out it is mandatory that each person apply their individual lock and tag to the group lock-out device.” The next page also states: “Each authorized employee shall affix a personal lock-out and tag-out device to the group lock-out device or group lock box BEFORE they begin work.” Exhibit 3 also includes a page titled “Disciplinary Action” that states “Disciplinary action will be taken if employees fail to follow necessary guidelines in the application of a Lock-out/Tag-out program up to and including termination.”

I find that Employer’s safety rules described in Exhibit 3 were in effect at the time of Claimant’s accident, and that before the accident, Claimant had received training in the rules.

Exhibit 6 is a document describing course name and course types for Claimant. It notes lock-out/tag-out procedure on 3/21/1995, 3/21/1996, 2/27/1997, 9/17/1998, 2/14/1999, 4/1/2001, 4/1/2005. It also notes lock-out/tag-out review on 11/6/2006 and lock-out/tag-out at annual safety day on 9/4/07.

Exhibit 8 is a notice of Claimant’s suspension from employment dated May 9, 2008. It states in part: “The Company has reviewed all procedures and documentation as related to the incident in your failure to perform proper Lock-Out procedures. You have acknowledged that you have been trained on proper Lock-Out Procedures and violated Company Safety Policies.” Exhibit 8 made no reference to any rule, policy, or procedure relating to use of pulley adjustments when changing belts.

Exhibit C is an Injury/Illness Report of Employer pertaining to Claimant’s accident. The Investigation Team included Jimmy DeArmund, Richard Duran, and others. The report states:

Employee was installing new belts on blending blower BL 5816. Two employees were given the assignment to replace the belts on blower 8L 5816. The employees then went to the equipment to perform the task. One employee locked out the electrical and this

employee did not use a lockout to de-energize the blower motor. The blower continued to rotate in the reverse direction due to air flow from the bin aeration blower (second energy source). No lockouts were used by either employee to emanate (sic) the air flow in the blower. The employees placed a rubber coated aluminum broom handle against the sheave of the blower in an attempt to stop the rotation of the blower. At this time the employees installed one of three required belts. When attempting to install the second belt the employees lost control of the blower and it began to rotate. It must be noted that the blower and the motor were coupled together at this time with one belt. When attempting to place the second belt the employee's right hand followed the travel of the belt and was caught between the belt and blower sheave as it rotated clockwise. Employee (sic) right pinky tip was amputated. His right ring finger and middle finger were lacerated requiring stitches as well.

Exhibit 9, the broken broom handle used by Claimant, is a hollow aluminum broom handle. It is coated with an orange material that appears to be plastic. The aluminum center of the broom handle is completely severed. The orange coating is nearly completely severed, but is joined for approximately one-half inch. One piece of the handle is approximately thirteen inches long and the other piece is approximately forty-five inches long. The broom handle is approximately seven-eighths of an inch in diameter.

The parties stipulated that on or about October 20, 2007, Claimant sustained an injury by accident or occupational disease in North Kansas City, Clay County, Missouri, arising out of and in the course of his employment, and Claimant's injury was medically causally related to an accident or occupational disease on or about October 20, 2007.

Exhibit 1 includes the medical reports, records, and Curriculum Vitae of Dr. Dana Towle. Dr. Towle's Curriculum Vitae notes he is Board Certified by the American Board of Plastic Surgery and has medical licenses in Missouri and Kansas. The CV notes Dr. Towle has been Clinical Assistant Professor, Plastic Surgery, Children's Mercy Hospital Through University of Missouri—Kansas City Medical School—1993 to present.

Dr. Towle's report pertaining to his April 10, 2008 exam of Claimant notes that Claimant was there for follow-up on his therapy and the functional capacity evaluation. His exam of the right hand indicated range of motion was decreased. Dr. Towle thought the best thing to do would be to return Claimant to work. He put Claimant on restrictions of no lifting, pushing or pulling over fifty pounds. His work release dated April 10, 2008

notes that Claimant may return to light activity. His limitations note no lifting, pushing or pulling over fifty pounds.

Exhibit 1 includes a Workers Rehab Center Work Hardening Physical/Occupational Therapy Progress/Discharge Report dated March 31, 2008. The Report notes Claimant's materials handling capabilities were occasional lifting—70 pounds right and left arm, frequent lifting—35 pounds right and left arm and continuous lifting—17 pounds right and left arm. The Assessment portion of the Report notes: "Patient meets or exceeds job requirements for lifting, per written job description."

Exhibit 1 includes Dr. Towle's April 17, 2008 note that indicates Claimant may return to full activity.

Dr. Towle's report pertaining to his exam of Claimant on August 11, 2008 notes he began treating Claimant on March 3, 2008 following Claimant's October 20, 2007 accident where his hand was caught in a wheel. His report notes Claimant had open wounds to the middle and ring finger and then amputation of the tip of the little finger and had a debridement of that. The report notes Claimant had been treated by Dr. Coyler. Dr. Towle notes he had referred Claimant to occupational therapy where he gained in strength and range of motion.

Dr. Towle's August 11, 2008 report notes results of the hand exam. Claimant had full flexion and extension of all digits of the left hand. His left hand grip strength was noted to be 91 pounds. Claimant was noted to have grip strength of 25 pounds in the right hand. Range of motion measurements were noted in the report. Dr. Towle's report contained the following rating: "By the JAMAR he did give a good effort on this exam. He would have a 42% of permanent. (sic) His right upper extremity at the level of the wrist. The above rating utilizes the AMA Guides to the Evaluation of Permanent Impairment (Rev. 5<sup>th</sup> Ed)."

Exhibit B is the Curriculum Vitae of Dr. Bernard M. Abrams as revised 3/10/08. It notes that his present academic position is Clinical Professor of Neurology, University of Missouri School of Medicine in Kansas City. Various administrative positions and editorial positions are identified. It also lists board certifications including American Board of Psychiatry and Neurology. Numerous publications and presentations are identified.

Dr. Abrams' January 17, 2009 report addressed to Claimant's attorney was admitted as Exhibit A. Dr. Abrams examined Claimant on January 14, 2009. Claimant's chief complaint was that he cannot make a complete fist, has stiffness in his fingers in the proximal inter-pharyngeal joints in the middle and ring fingers, and his right index finger is stiff. He was noted also to have loss of dexterity of his right hand such as picking up

small objects or using a pencil. The report describes Claimant's October 20, 2007 injury to his gloved right hand when unexpected machinery movement caused his hand to get caught between the pulley and a drive belt. Claimant's medical care was described including reattachment of the amputated tip of the fourth right finger, suturing of lacerations of the injured fingers, physical therapy, and work hardening. Dr. Abrams noted symptoms of numbness, tingling, and swelling in the right hand had persisted despite months of physical therapy. He stated Claimant continued to exhibit a very significant loss of right hand flexibility and grip strength. He noted that due to work restrictions, Claimant was held out of work from October 20, 2007 until May 15, 2008.

Dr. Abrams performed an examination of Claimant. He noted that Claimant's hand grip of the dominant right hand was 19 kg at mid-position repeated five times and his left was 78 kg. The muscles were noted to have 3.5/5 strength. Dr. Abrams noted a review of records of Dr. Dana Towle, work release, North Kansas City Hospital records and records of Jeffrey Colyer.

Dr. Abrams stated with reasonable medical certainty that there is a quite significant loss of grip strength of the dominant right hand, confirmed by objective measurement of over 75% and noticeable loss of manual dexterity and fine finger movement of the right hand all causally related to the October 20, 2007 accident as the prevailing factor. He stated that future medical care would consist of periodic occupational therapy if his hand continues to stiffen. Dr. Abrams further stated: "With reasonable medical certainty, his permanent partial disability, attributable to the current accident would be 65% at the level of the right elbow, the equivalent of 34% of the body as a whole."

## **Rulings of Law**

Based on a comprehensive review of the substantial and competent evidence, including the testimony of the witnesses, the expert medical opinions and deposition, the medical records, the exhibits admitted in evidence, the stipulations of the parties, and my personal observations of Claimant at the hearing, I make the following rulings of law:

Section 287.800, RSMo<sup>1</sup> provides in part that administrative law judges shall construe the provisions of this chapter strictly and shall weigh the evidence impartially

---

<sup>1</sup> All statutory references are to RSMo 2006 unless otherwise indicated. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000). See also *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

The Court in *Allcorn v. Tap Enterprises, Inc.*, 277 S.W.3d 823 (Mo. App. 2009) states at 828:

[A] strict construction of a statute presumes nothing that is not expressed. 3 Sutherland Statutory Construction § 58:2 (6th ed. 2008). The rule of strict construction does not mean that the statute shall be construed in a narrow or stingy manner, but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used. 82 C.J.S. *Statutes* § 376 (1999). Moreover, a strict construction confines the operation of the statute to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. 3 Sutherland Statutory Construction § 58:2 (6th ed. 2008). The clear, plain, obvious, or natural import of the language should be used, and the statutes should not be applied to situations or parties not fairly or clearly within its provisions. 3 Sutherland Statutory Construction § 58:2 (6th ed. 2008).

Section 287.808, RSMo provides:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Section 287.030.2, RSMo provides: “Any reference to employer shall also include his or her insurer or group insurer.”

1. Employer’s liability for permanent partial disability benefits, including disfigurement.

Section 287.190, RSMo provides for permanent partial disability benefits. The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. banc 2003)<sup>2</sup>; *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App.

---

<sup>2</sup> Several cases are cited herein that were among many overruled by *Hampton* on an unrelated issue (*Id.* at 224-32). Such cases do not otherwise conflict with *Hampton* and

1989). While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo.App. 1986); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett v. Bentzinger Bros., Inc.*, 595 S.W.2d 441, 443 (Mo.App.1980); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Fogelson v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

The finding of disability may exceed the percentage testified to by the medical experts. *Quinlan*, 714 S.W.2d at 238; *McAdams*, 429 S.W.2d at 289. The Commission “is free to find a disability rating higher or lower than that expressed in medical testimony.” *Jones v. Jefferson City School Dist.*, 801 S.W.2d 486, 490 (Mo.App. 1990); *Sellers*, 776 S.W.2d at 505. The Court in *Sellers* noted that “[t]his is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, ‘the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.’” *Sellers*, 776 S.W.2d at 505. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. *Gilley v. Raskas Dairy*, 903 S.W.2d 656, 658 (Mo.App. 1995); *Jones*, 801 S.W.2d at 490.

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the

---

are cited for legal principles unaffected thereby; thus *Hampton's* effect thereon will not be further noted.

Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004).

Claimant testified he did not fully recover from the accident, and cannot fully extend his fingers. He cannot make a full tight fist and he still has numbness and tingling in his hand. He has trouble holding wrenches and nuts. He has lost strength because of the accident. I find this testimony credible.

The March 31, 2008 Work Hardening report notes lifting limitations for Claimant including 17 pounds right and left. Dr. Towle notes significant right hand grip strength loss compared to the left hand. Dr. Towle's April 17, 2008 note indicates Claimant may return to full activity. Dr. Towle concluded on August 11, 2008 that Claimant would have a 42% of permanent (sic) of his right upper extremity at the level of the wrist based on the AMA Guide. There is no evidence that Claimant received any medical treatment for his right hand after August 11, 2008.

Dr. Abrams noted on January 17, 2009 that Claimant continued to exhibit a very significant loss of right hand flexibility and grip strength. He noted Claimant's right hand is his dominant hand. Dr. Abrams concluded that Claimant's permanent partial disability attributable to the current accident would be 65% at the level of the right elbow, which he stated is the equivalent of 34% of the body as a whole.

I find that as a result of Claimant's October 20, 2007 accidental injury, he sustained significant permanent loss of hand flexibility and grip strength of his dominant right hand which affects his ability to work. I find that the proper level of Claimant's disability is at the wrist joint (175 week level). I find, based on the substantial and competent evidence and the application of the Workers' Compensation Law, that as a result of Claimant's October 20, 2007 accidental injury, he sustained a 55% permanent partial disability to his right upper extremity at the level of the wrist, or 175 week level, or 96.25 weeks of compensation. I award 96.25 weeks of compensation to Claimant from Employer for permanent partial disability, subject to reduction for a safety penalty violation discussed hereafter. In addition, I find, allow, and award to Claimant from Employer 4 weeks of disfigurement for the scarring on Claimant's right hand caused by the October 20, 2007 accident, subject to reduction for a safety penalty violation discussed hereafter.

2. Whether a penalty should be assessed against Claimant's benefits in this case for alleged safety violations, and if so, the extent of the penalty, and Employer's liability for interest on alleged underpaid temporary total disability benefits.

Employer asserts that Claimant's benefits should be reduced for alleged safety violations pursuant to Section 287.120.5, RSMo. Section 287.120.5, RSMo provides:

5. Where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

In order for a penalty to be assessed against an employee for failing to obey a safety rule under The Law, all of the following must be proven:

1. Employer must have adopted a rule for the safety of employees.
2. The rule must be reasonable.
3. The employee failed to obey the rule.
4. The employee's injury was caused by his or her failure to obey the rule.
5. The employee had actual knowledge of the rule.
6. The employer had, prior to the injury, made a reasonable effort to cause his or her employees to obey or follow the rule so adopted for the safety of the employees.

First, I find that at the time of Claimant's accidental injury on October 20, 2007, Employer had adopted the following rules contained in Exhibit 3 for the safety of its Employees:

All energy isolating devices that are needed to control the energy to the machine or equipment shall be physically located and operated in such a manner as to isolate the machine or equipment from the energy source(s).

Lock-out or tag-out devices shall be affixed to each energy isolating device. Shall be affixed so that it will hold the energy isolating devices in a 'safe' or 'off' position.

All potentially hazardous stored or residual energy shall be relieved, disconnected, restrained, and otherwise rendered safe.

The authorized employee shall verify that isolation and de-energization of the machine or equipment have been accomplished. Now, you can begin working on equipment!

Second, I find that these safety rules were reasonable. The rules demonstrate an intent to prevent injury to Employer's employees and prevent damage to Employer's property. Locking out and tagging out machinery is designed to prevent employees from coming into contact with moving machinery in order to avoid injury.

Third, I find that Claimant failed to obey these safety rules. I find that Claimant (a) did not isolate the machine that caused his injury from the energy sources; (b) did not affix his lock-out tag-out device to each energy isolating device so that they will hold the energy isolating devices in a "safe" or "off" position; (c) did not relieve, disconnect, restrain, or otherwise render safe all potentially hazardous stored or residual energy; and (d) did not verify that isolation and de-energization of the machine had been accomplished. Claimant admitted he did not lock out and tag out the machinery before the accident. He admitted he did not isolate the back flow air and did not shut off the back flow air valve before the accident. He did not relieve, disconnect, restrain, or otherwise render safe the back flow air prior and did not stop the turning sheave prior to the accident. He did not verify that isolation and de-energization of the machine had been accomplished. The sheave continued to turn before the accident. Claimant placed the broom handle into the sheave to stop it from turning, but he did not isolate the reason that it was turning, and did not de-energize the machine. I find that Claimant was not trained that it was permissible to block with a broom handle. I further find that Claimant's use of a broom handle was not a proper means of stopping the turning sheave, or blocking, and did not comply with the safety rules. Further, Claimant was disciplined for failure to perform proper Lock-Out procedures.

Fourth, I find that Claimant's injury was caused by his failure to obey the rules. The Court in *Swillum v. Empire Gas Transport, Inc.*, 698 S.W.2d 921, 929 (Mo.App. 1985) states:

Under § 287.120.5, RSMo 1978, and *Brown v. Weber Implement & Auto Co.*, 357 Mo. 1, 206 S.W.2d 350, 355 (1947), the failure of an employee to obey a safety rule does not authorize the reduction of an award unless the injury is caused by such failure. That is, there must be a causal connection between the violation of the employer's safety rule and the employee's injury.

Claimant was injured when his right hand was drawn between a moving pulley and a belt. I find that Claimant was injured because he did not shut off the energy to the blower motor before beginning the belt replacement work. He did not isolate and de-energize the equipment. If he had, the accident would not have occurred. Claimant testified when he was attempting to put on the belt the machine suddenly moved. Mr. Duran testified that the accident was caused by Claimant not locking out of the electrical

source and not locking out the air that turned the pulley. Employer's Injury/Illness Report, Exhibit C, notes, "When attempting to install the second belt the employees lost control of the blower and it began to rotate." Dr. Abrams noted that Claimant was injured when unexpected machinery movement caused his hand to get caught between the pulley and a drive belt.

Fifth, I find that at the time of the accident, Claimant had actual knowledge of the rule. Claimant testified that he did not knowingly violate a safety rule. I do not believe that testimony. Claimant testified that he was trained several times on Employer's lock out/tag out procedures. Exhibit 6 documents that Claimant had received training on lock out/tag out procedures several times between 1995 and September 4, 2007. Claimant testified, and I find, that Claimant did not know the location of the back flow shut off valves prior to the accident. However, that did not relieve him of his responsibility to comply with the safety rules and to de-energize the equipment. Claimant still should have de-energized the equipment before beginning the work.

Sixth, I find that prior to Claimant's injury, Employer had made a reasonable effort to cause its employees to obey or follow the rules so adopted for the safety of the employees. The evidence demonstrates that Employer trained its employees, including Claimant, on several occasions about its lock out/tag out rules. Exhibit 3 includes training materials Employer used in training its employees. These materials, as well as the testimony of the witnesses, prove that Employer had made an effort to cause its employees to obey and follow the rules so adopted. I find the training was reasonable. I find the training provided to Employer's employees demonstrated a reasonable effort to cause its employees to obey and follow the rules so adopted.

I find that Employer did not establish that Section 287.120.5, RSMo applies to Claimant's failure to adjust the pulley adjustment before beginning the belt replacement. I do not believe the testimony of Claimant and Ronald Walker that they attempted to adjust the pulley before performing the work, and could not adjust it because it was broken. I believe the testimony of Dr. Duran and Mr. DeArmund that they inspected the adjustment soon after the accident and found that it was not broken. I also believe the testimony of Mr. DeArmund that his inspection revealed that there were no tool marks on the nuts and bolts and there was a starch buildup on the adjustment that indicated the adjustment was not used and no adjustment was tried. Further, the fact that Claimant and Mr. Walker did not tell Mr. DeArmund there was anything wrong with the pulley adjustment after the accident indicates it was not broken.

I believe Mr. Duran's testimony that Employees are advised to use the adjustment to relieve the stress when changing belts and that it is the policy of the Employer to use the pulley adjustment on the machine. I believe Mr. Willets' testimony that employees are trained to use the adjustment mount for safety.

However, I find that the evidence does not demonstrate when the pulley adjustment policy was in force, or that Claimant specifically was trained in that procedure, or had actual knowledge that it was a rule of Employer to use the pulley adjustment when changing belts. Claimant was not disciplined for violation of a rule regarding failure to use the pulley adjustment. He was disciplined for violating the lock out/tag out rule. Further, Exhibit C, Employer's Injury/Illness Report, did not make reference to Claimant violating a rule regarding failure to use the pulley adjustment.

The penalty provided in Section 287.120, RSMo applies to all compensation, including medical bills. Medical expenses have been considered "compensation" for the purpose of applying the penalty. *See Nolan v. Degussa Admixtures, Inc.*, 246 S.W.3d 1 (Mo.App. 2008) which affirmed the Commission in modifying the ALJ's decision to the extent that she excluded past medical expenses from a 15% penalty reduction.

I have found that the penalty statute does apply in this case. The statute does not provide guidance in determining the percentage to apply if a penalty violation is found. Employer argues Claimant's conduct was egregious and as a result, the Court should assess a 50% penalty. I find that Claimant's conduct amounted to more than a minor safety violation, and was serious, but was not egregious in nature. Claimant's attempt to stop the moving sheave with a broom handle shows an effort to be more careful than to completely ignore the movement and attempt to change the belt while the sheave continued to turn.

I find that Section 287.120.5 is applicable in this case and that all of Claimant's benefits should be reduced by 37.5%. Employer/Insurer paid the sum of \$13,991.00 in medical benefits. The penalty of 37.5% applied to that sum is \$5,246.96. Employer is entitled to and is awarded a credit from the additional benefits awarded for the \$5,246.96 amount of the penalty assessed against medical benefits.

I find that Employer was responsible to pay Claimant temporary total disability benefits for 26 5/7 weeks. Employer/Insurer paid the sum of \$11,372.76 in temporary total disability benefits for 26 5/7 weeks. The total amount which should have been paid for that period at the agreed temporary total disability rate of \$742.72 per week is \$19,841.23. The penalty of 37.5 % applied to this \$19,841.23, which is \$7,740.46, results in a temporary total disability underpayment of \$728.01. The additional amount of \$728.01 in unpaid temporary total disability benefits is hereby awarded in favor of Claimant from Employer.

I have awarded 96.25 weeks of permanent partial disability in favor of Claimant based on 55% at the 175 week level. Claimant's weekly compensation rate for permanent partial disability is \$389.04 per week. The

permanent partial disability of 96.25 weeks amounts to \$37,445.10 (.55 times 175 times \$389.04). When the penalty of 37.5% is applied to this sum, the net amount due for permanent partial disability is \$23,403.19 after reduction of the penalty. The sum of \$23,403.19 is hereby awarded to Claimant for permanent partial disability.

I have allowed 4 weeks of permanent partial disability in favor of Claimant for disfigurement, which amounts to \$1,556.16 before reduction for the penalty. When the penalty of 37.5% is applied to this sum, the net amount due to Claimant is \$972.60 after reduction of the penalty. The sum of \$972.60 is hereby awarded to Claimant for disfigurement.

The total due Claimant from Employer is therefore \$19,856.84, as summarized below:

Benefit type	Amount due without penalty	37.5% penalty	Amount previously paid	Net due
TTD	\$19,841.23	\$7,740.46	\$11,372.76	\$728.01
PPD	\$37,445.10	\$14,041.91	\$0.00	\$23,403.19
Disfigurement	\$1,556.16	\$583.56	\$0.00	\$972.60
Medical	\$13,991.90	\$5,246.96	\$13,991.90	<\$5,246.96>
Total benefits due				\$19,856.84

Claimant has requested that he be awarded interest on any underpaid past temporary total disability compensation. Section 287.160.3, RSMo provides:

3. Where weekly benefit payments that are not being contested by the employer or his insurer are due, and if such weekly benefit payments are made more than thirty days after becoming due, the weekly benefit payments that are late shall be increased by ten percent simple interest per annum. Provided, however, that if such claim for weekly compensation is contested by the employee, and the employer or his insurer have not paid the disputed weekly benefit payments or lump sum within thirty days of when the administrative law judge's order becomes final, or from the date of a decision by the labor and industrial relations commission, or from the date of the last judicial review, whichever is later, interest on such disputed weekly benefit payments or lump sum so ordered, shall be increased by ten percent simple interest per annum beginning thirty days from the date of such order. Provided, however, that if such claims for weekly compensation are contested solely by the employer or insurer, no

interest shall be payable until after thirty days after the award of the administrative law judge. The state of Missouri or any of its political subdivisions, as an employer, is liable for any such interest assessed against it for failure to promptly pay on any award issued against it under this chapter.

Claimant's claims for weekly compensation were contested by Employer and Insurer in this case. Any past due compensation shall bear interest as provided by law.

### 3. Issues Limited by Stipulations of the Parties.

Claimant asserts in his Brief that issues to be determined included the employer's liability for future medical aid and any TTD compensation associated with any such future medical aid. However, at the hearing, the parties did not stipulate that those issues be determined.

The Commission in *Employee: Kenneth J. Douglas, Employer: Sharkey Transportation Inc.*, 2009 WL 1272573, 9 states the following:

Since the parties did not stipulate to any issue as to whether or not employee sustained an occupational disease arising out of and in the course of his employment due to repetitive motion, the administrative law judge would have acted in excess of his powers pursuant to section 287.495 RSMo, by considering such issue in the award. The Commission and the administrative law judge are guided by the holding in *Boyer v. National Express Co., Inc.*, 49 S.W.3d 700 (Mo.App. E.D. 2001), which states the following:

The Rules of the Department of Labor and Industrial Relations, in particular, 8 CSR 50-2.010(14), provide: "hearings before the division shall be simple, informal proceedings. The rules of evidence for civil cases in the state of Missouri shall apply. Prior to hearing, the parties shall stipulate uncontested facts and present evidence only on contested issues." Therefore, the ALJ should confine the evidence during the hearing to the stated contested issues. *Lawson v. Emerson Electric Company*, 809 S.W.2d 121, 125 (Mo.App. S.D. 1991). Stipulations are controlling and conclusive, and the courts are bound to enforce them. *Spacewalker, Inc. v. American Family*, 954 S.W.2d 420, 424 (Mo.App. E.D. 1997). A stipulation should be interpreted in view of the result, which the parties were attempting to accomplish. *Id.* In *Lawson*, our colleagues in the Southern District concluded that the Commission acted in excess of its powers in making its award on

grounds not in issue. *Lawson v. Emerson Electric Company*, 809 S.W.2d at 126.

*Boyer*, 49 S.W.3d at 705.

The administrative law judge and Commission are precluded from going beyond the issues stipulated for trial and to do so either would be acting without or in excess of its powers pursuant to section 287.495 RSMo, by making such an award.

I find these additional raised in Claimant's Brief were not presented as issues in dispute to be determined by the Court, and the Court is therefore precluded from determining these additional issues.

4. Attorney's fees.

Claimant's attorney is entitled to a fair and reasonable fee in accordance with Section 287.260, RSMo. An attorney's fee may be based on all parts of an award, including the award of medical expenses. *Page v. Green*, 758 S.W.2d 173, 176 (Mo.App. 1988). Claimant's attorney did not offer a written fee agreement in evidence at the hearing. However, during the hearing, and in Claimant's presence, Claimant's attorney requested a fee of 25% of all benefits to be awarded. Claimant did not object to that request. I find Claimant's attorney, Wilson Stafford, is entitled to and is awarded an attorney's fee of 25% of all amounts awarded for necessary legal services rendered to Claimant. The compensation awarded to Claimant shall be subject to a lien in the amount of 25% of all payments herein in favor of the following attorney for necessary legal services rendered to Claimant: Wilson Stafford.

Conclusion

In conclusion, I award Claimant the total sum of \$19,856.84 against Employer after application of the penalty. Claimant's claim against the Second Injury Fund has not been determined and remains open.

Date: June 19, 2009

Made by: /s/ Robert B. Miner

Robert B. Miner  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson

Naomi Pearson  
*Division of Workers' Compensation*