

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

Injury No.: 98-111699

Employee: Dan Whitt
Employer: Warren County Concrete
Insurer: Continental Western Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)
Date of Accident: September 11, 1998
Place and County of Accident: Warren County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 13, 2005. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued September 13, 2005, 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 26th day of October 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Dan Whitt

Injury No.: 98-111699

Dependents: N/A
Employer: Warren County Concrete
Additional Party: Second Injury Fund (Dismissed)
Insurer: Continental Western Ins. Co.
Hearing Date: June 15, 2005

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: KOB

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: September 11, 1998
5. State location where accident occurred or occupational disease was contracted: Warren 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: Claimant climbed up a silo to knock loose some jammed concrete when the platform broke, he fell through the floor, and landed 40 feet below on the left side of his body
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Multiple parts, including tailbone, left lower extremity, left hip, mouth, and body as a whole.
14. Nature and extent of any permanent disability: Permanent and total disability.
15. Compensation paid to-date for temporary disability: \$29,771.00
16. Value necessary medical aid paid to date by employer/insurer? \$86,054.01

E Employee: Dan Whitt

Injury No.: 98-111699

17. Value necessary medical aid not furnished by employer/insurer? \$355.77
18. Employee's average weekly wages: \$760.28
19. Weekly compensation rate: \$ 506.85 / \$294.73
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:

\$355.77

Permanent total disability benefits of \$506.85 per week from Employer

Beginning December 20, 1999, for Claimant's lifetime:

INDETERMINATE

22. Second Injury Fund liability: No (Claim dismissed)

TOTAL:

INDETERMINATE

23. Future requirements awarded: Medical treatment as per award.

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: Michael T. Londoff.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Dan Whitt	Injury No.:	98-111699
Dependents:	N/A	Before the	
Employer:	Warren County Concrete	Division of Workers'	
Additional Party:	Second Injury Fund (Dismissed)	Compensation	
Insurer:	Continental Western Ins. Co.	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	KOB

PRELIMINARIES

The matter of Dan Whitt ("Claimant") proceeded to hearing in Mexico, Missouri to determine the nature and extent of the disability he suffered as a result of a work accident. Attorney Michael T. Londoff represented Claimant. Attorney Susan Turner represented Warren County Concrete ("Employer") and its Insurer, Continental Western Insurance Company. Claimant dismissed his claim against the Second Injury Fund.

The parties stipulated that on September 11, 1998, Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury to multiple body parts. At the time, Claimant earned an average weekly wage of \$760.28, which corresponds to rates of compensation of \$506.85 for total disability benefits, and \$294.73 for permanent partial disability benefits. Employer paid \$29,771.00 in temporary total disability benefits, from April 19, 1999 to December 19, 1999^[1], or 58 5/7ths weeks, and \$86,054.01 in medical benefits. Employment, venue, notice, and timeliness of the claim were not at issue.

The issues to be determined by way of hearing are: 1) Shall Claimant recover past medical expenses of up to \$732.85; 2) Shall Claimant receive future medical care to cure and relieve the effect of the injuries; and 3) What is the nature and extent of Claimant's disability? Claimant seeks permanent and total disability benefits.

SUMMARY OF THE EVIDENCE

Live Testimony

Claimant is a fifty-two year old male with an eleventh-grade education, who has experience in welding, truck driving, construction, factory work, and attending a gas station. Claimant testified he worked hard his entire life, always had

a good attendance work record and had never been written-up for poor work habits by any employer. At the time of his injury, Claimant was working in a supervisory position for Employer, which involved overseeing six to eight employees, taking orders, answering phones, and batching concrete.

Late in the evening on September 11, 1998,^[2] Claimant climbed up a silo to knock loose some jammed concrete when the platform broke, he fell through the floor, and he landed 40 feet below on the left side of his body. He lost consciousness, and sustained fractures of the left tibia and fibula, left ischial tuberosity and pubic rami, a laceration of the left buttock, and injury to his mouth and teeth. Claimant was attended at the scene by a firefighter, and was ultimately taken by helicopter to the University Hospital in Columbia, Missouri. Claimant spent approximately thirteen days as an in-patient, where he underwent several surgical procedures to his leg, hip, and tailbone. In March of 1999, Claimant had an additional surgical procedure performed to address a non-union of the left tibia fracture.

Claimant testified as a result of his work-related injury of September 11, 1998 he had the following injuries: a tailbone fracture, which left an indentation in his buttock cheek and causes difficulty with bowel movements; broken bones in his left tibia and fibula requiring surgical intervention; a surgically repaired left hip injury; instability in his left knee due to a torn medial meniscus and ACL joint; a fractured left ankle; and knocked out teeth that required subsequent medical attention.

Claimant has been under a doctor's care since August 30, for the medical and psychological (anxiety) problems he has as a result of his work-related injury. Additionally, Dr. Larry Ficklin treated Claimant's teeth. Claimant testified Dr. Ficklin removed all of his upper teeth and put in a plate, and indicated he would require future dental attention for replacement of his upper plate and teeth.

Claimant testified that following a functional capacity examination, the authorized treating physician released him to go back to work on a light duty basis. Claimant did so beginning on or about April 19, 1999 for a maximum of one to two hours per day doing sedentary work like answering phones, doing light paperwork, emptying ashtrays, etc. When the doctors released him to a full eight-hour day, he was ordered to operate and run a heavy end-loader (Exhibit G). Claimant indicated he could not operate the equipment more three hours, did it on one occasion, and was incapable of doing so thereafter. The last day Claimant worked for Employer was on or about December 14, 1999.^[3]

The disabling complaints Claimant attributes to his accident are numerous. He has difficulty with stairs, standing, sitting, and sleeping. He cannot kneel, carry anything heavy, walk over half a city block, or climb a ladder. He no longer cuts the grass, helps with housework, works on his car, does laundry, or rides in a car for any period of time. He feels his personality has changed, and he is more argumentative and less enjoyable to be around. Claimant was consistently and constantly standing up and sitting down during his testimony in the hearing of June 15, 2005. Claimant insisted he uses a cane a vast majority of the time, although the videotapes presented by Employer show him without the cane on two occasions.

Claimant requested reimbursement of his outstanding pharmaceutical bills of \$594.20 and out-of-pocket expenses of \$138.65. He requested that the medical and dental medical treatment associated with his injuries be left open.

Mitch Parrish, Claimant's supervisor and a partner in Employer, testified his company was able to accommodate Claimant's work restrictions, found work for him at several of their plant locations, and would have continued to employ him had he not voluntarily quit. Mr. Parrish indicated Claimant was and would be allowed to sit, stand, and move as needed, and could work significantly less than eight hours a day if necessary.

Medical Evidence

The medical record evidence is consistent with the other credible evidence, and includes hospital records and x-rays showing significant hardware in the left lower extremity. There is no real dispute over the medical treatment as all evidence indicates the treatment to date has been reasonable and necessary.

On January 11, 2000, Claimant saw Dr. Jeffrey Anglen, an orthopedic trauma specialist, who declared Claimant had healed, was at maximum medical improvement, and had no permanent disability. He saw no physical reason why Claimant could not continue to work. On January 21, 2000, Dr. Keith Kenter reevaluated Claimant, whose knee was stable, but had complaints of pain and discomfort with sitting and when using stairs. Dr. Kenter did not believe surgical intervention was necessary, and gave him a rating of 10 percent of the knee. He noted long-term restrictions include limited ladder climbing and mostly sedentary work at a desk.

Dr. Joel Jeffries, an orthopedic surgeon, evaluated Claimant on behalf of Employer and testified by deposition on May 27, 2004. Dr. Jeffries felt the tests he performed showed Claimant's perception of his own pain was greater than the objective evidence would suggest. Based on statistical data, he did not think removal of hardware or surgery to address the knee instability would be prudent for Claimant, but agreed such procedures could be reasonable. His assessment of permanent partial impairment (not disability) was 21 percent of the body for all injuries. He felt that in an FCE on

December 3, 2003, Claimant demonstrated a sedentary physical demand level, was capable of working eight hours a day, could stand, reach, stoop, and forward reach on a frequent basis, and could sit, walk, crawl, kneel and climb ladders on an occasional basis.

Dr. Raymond Cohen evaluated Claimant and testified by deposition on June 27, 2003. Dr. Cohen found Claimant to have 30 percent permanent partial disability of the sacrum, 50 percent of the left hip, 60 percent of the left knee, and 15 percent of the left ankle. He felt all disabilities combined to result in permanent total disability, and did not believe Claimant was employable in the open labor market because of the injuries sustained on September 11, 1998. He also thought Claimant would benefit from treatment for chronic pain. Dr. Cohen assessed vocational restrictions of no lifting greater than 10 pounds, no sitting for more than 20 minutes without a break, no squatting, kneeling or climbing a ladder or standing for more than 20 minutes.

Vocational evaluations were performed by **Dr. Samuel Bernstein** for Claimant, and **James England** for Employer. Dr. Bernstein, a licensed psychologist and vocational expert, took into consideration Claimant's background, psychological factors, general observations, medical history, daily activities, education and work history, and performed testing. He concluded that, as a result of a combination of the aforementioned, within a reasonable degree of professional certainty, Claimant would not be hired, and could not carry out sustained work activities. He concluded that Claimant was unemployable in the open competitive labor market given his age, his impairments, and their cumulative effects. According to Mr. England, while Claimant was not able to return to prior jobs because of the permanent physical restrictions, he was employable in the open labor market in jobs requiring sedentary physical exertion, such as in the service industry, noting Claimant's best employment opportunity would have been to remain with the concrete company where he worked after the accident.

Claimant submitted exhibits documenting \$594.20 in pharmaceutical expenses (Exhibit I), \$7,843.80 in medical expenses^[4] (Exhibit J), and \$138.65 in out of pocket expenses (Exhibit K).

FINDINGS OF FACT AND RULINGS OF LAW

Based on careful and comprehensive consideration of all the evidence, including witness' testimony, the medical records, the expert opinions, and the application of the Law of Missouri, I find that Claimant is permanently and totally disabled as a consequence of his work related accidental injury. Specifically, I find as follows:

Claimant shall recover the past medical expenses associated with his work injury.

Claimant seeks reimbursement of several categories of unpaid expenses. The method of proving medical bills was set forth in *Martin v. Mid-America Farmland, Inc.*, 769 S.W.2d 105 (Mo. banc 1989), wherein the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits.

We believe that when such testimony accompanies the bills, which the employee identifies as being related to and are the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records and evidence, a sufficient, factual basis exists for the Commission to award compensation. The employer, may, of course, challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. *Id.* at 111-12.

Claimant is seeking \$594.20 in pharmaceutical expenses (Exhibit I) and \$138.65 in out of pocket expenses (Exhibit K). Of the expenses listed in Exhibit I, I find that Employer shall reimburse Claimant for prescription medications that relieve pain, relax muscles, or address symptoms of anxiety or depression. In addition, the tailbone cushion and cane are reasonable and necessary to relieve the effects of Claimant's injury. Employer shall pay \$312.92 of the expenses documented in Exhibit I. The remaining charges are associated with medications to non-work related conditions (i.e. high blood pressure), or relate to the drugs listed on page 11 of 13, which were not included because the document is illegible. Of the charges on Exhibit K, I find \$42.85 to be owed Claimant by Employer. The steel toe boots are not necessary to cure and relieve the effects of the injury. Employer shall pay \$355.77 in past medical expenses.

Employer shall provide ongoing medical treatment to cure and relieve the injuries.

The right to medical aid is a component of the compensation due an injured worker. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. S.D. 1996). Where future medical benefits are awarded, the "medical care must flow from the accident before the employer is to be held responsible." *Modlin v. Sun Mark, Inc.*, 699 S.W.2d 5, 7 (Mo.App.E.D.1985). The claimant must show a "medical causal relationship" between the condition and the accident. *Mathia at 277*. It is not necessary that the claimant seeking future medical benefits produce conclusive evidence to support that claim. *Id.* A worker is entitled to medical treatment as may reasonably be required to *cure and relieve from the effects of the injury*. *Id.* Such future care to "relieve" should not be denied simply because a claimant may have achieved maximum medical improvement. *Id.* at 278; *See also Williams v. City of Ava*, 982 S.W.2d 307, 311-12 (Mo.App. S.D. 1998).

Claimant has established with reasonable probability that future medical treatment will be required to cure and relieve

from the effects of the injury, and that such future medical treatment bears a medical causal relationship to his work related accident. The evidence supports an award of future medical treatment to encompass prescription pain medication, muscle relaxants, and medication to treat Claimant's anxiety and depression, along with the appropriate physician supervision while Claimant is taking these prescriptions. Furthermore, Claimant's dental work is related to his fall, and he shall receive all dental treatment indicated by Dr. Larry Ficklin for the care and maintenance of the dental work he provided after and as a result of the fall. Finally, Employer shall provide any additional conservative or surgical treatment that may be required to address the multiple injuries Claimant sustained in his fall to his left lower extremity and hip, including but not limited to treatment to address Claimant's knee instability or to remove hardware.

Employer shall provide future medical treatment to cure and relieve the effects of Claimant's accidental injury as indicated in this Award and provided by Law.

Claimant is permanently and totally disabled as a result of his work accident.

Claimant seeks lifetime permanent total disability benefits. "A claimant is considered totally disabled, for purposes of the [Workers' Compensation Law], if he is unable to return to any employment, not merely the employment in which he was engaged at the time of the accident." *Kerns v. Midwest Conveyor*, 126 S.W.3d 445, 451 (Mo.App. W.D.2004) (citing §287.020.7). The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. *McCormack v. Carmen Schell Const. Co.*, 97 S.W.3d 497, 512 (Mo.App. W.D.2002)(overruled on other grounds in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)). "The 'pivotal question' is whether an employer can reasonably be expected to hire this employee, given his or her present physical condition, and reasonably expect the employee to successfully perform the work." *Garrone v. Treasurer of State of Missouri*, 157 S.W.3d 237, 244 (Mo.App. E.D.2004).

I find that Claimant has met his burden of establishing he is permanently and totally disabled, based on Claimant's testimony, Employer's attempts to accommodate Claimant, and the medical and vocational experts whose opinions I find most convincing. First, I find Claimant is, by his own testimony, physically unable to participate in the work force in even sedentary positions. Due to his inability to sit for any period of time, limited mobility, trouble with stairs, sleep problems, and depressive symptoms, it is unreasonable to expect Claimant to be able to prepare himself for, get to, and perform the labor of the most inactive of jobs, even if he could convince an employer to hire him. I acknowledge some portions of the videos show Claimant's ability to move in a much more fluid manner than shown at trial, in various doctor's offices, or by his own description. The apparent inconsistencies call into question some of Claimant's complaints. However, given the overwhelming objective evidence of injury, and the limited coverage of the video evidence, I do not think the videos are so contradictory as to find Claimant completely unbelievable. Even discounting some of Claimant's complaints, I still find him unemployable.

Employer bent over backwards to attempt to accommodate Claimant's limitations and restrictions after the accident. Employer allowed Claimant to work limited hours, paid temporary partial benefits, provided simple light duty work, and offered work at its various plants. Mr. Parrish indicated Claimant was allowed to sit, stand, and move as needed, and could work less than eight hours a day if necessary, even suggesting he would still make available such limited hours if necessary. Such efforts are commendable. However, if such extreme efforts were necessary to accommodate Claimant, it is reasonable to conclude that Claimant could not find an employer in the open labor market willing to make such accommodations. Total disability is a measure of Claimant's ability to compete in the open labor market, not his ability to find a single Employer willing to initiate extreme measures to allow him to earn a paycheck.

Finally, the expert evidence establishes Claimant is permanently and totally disabled. Dr. Cohen reached his conclusion of total disability based on a complete and accurate understanding of Claimant's disabilities. Dr. Bernstien considered Claimant has depressive symptoms. The conclusion reached by these experts is most consistent with the overwhelming weight of the evidence. I find the several experts who conclude Claimant can work either do not take into account all the injuries and disability associated with Claimant's accident, or are otherwise not credible. Specifically, Dr. Jeffries relied on AMA guidelines to impairment, and did not assess disability, relied on the videos to make credibility determinations reserved for the finder of fact, and did not consider the complete and accurate record. Mr. England's suggestions for employment opportunities were not compelling. I find the credible expert evidence establishes Claimant's inability to compete in the open labor market on a permanent basis.

Employer shall provide lifetime permanent and total disability benefits.

CONCLUSION

Claimant's September 11, 1998 work accident caused multiple serious injuries, which combine to render him permanently and totally disabled. Employer shall reimburse medical expenses and provide Claimant with medical treatment as provided above. Employer shall also pay permanent and total disability benefits as provided in this Award and by law.

Date: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia ("Pat") Secrest
Director
Division of Workers' Compensation

[\[1\]](#) Employer's attorney provided the dates of payment in a post-hearing letter, as requested by the ALJ.

[\[2\]](#) Claimant fell around 10:00 at night on the 11th, but did not arrive at the hospital until after midnight, so some records and doctors refer to the accident date as September 12th.

[\[3\]](#) Employer stipulated to Claimant's last day of work in post-hearing correspondence.

[\[4\]](#) At hearing, counsel for Employer/Insurer stipulated to liability on behalf of her client for the expenses associated with Claimant's dental work. Pursuant to the stipulation, Employer/Insurer shall hold Claimant harmless on any charges contained within Exhibit J or associated with his dental work.