

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

Injury No.: 03-076753

Employee: Eric Williamson
Employer: Emery Sapp & Sons, Inc.
Insurer: General Casualty Company of Wisconsin

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 November 16, 2009. The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued November 16, 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 16th 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: Eric Williamson

Injury No. 03-076753

Dependents:

Employer: Emery Sapp & Sons, Inc.

Additional Party: None

Insurer: General Casualty Company of Wisconsin

Hearing Date: August 18, 2009

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
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: April 17, 2003.
5. State location where accident occurred or occupational disease was contracted: Clark County, Mo.
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 working on a bridge and fell approximately forty feet.
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: Head, brain, right wrist, left clavicle, spine.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to-date for temporary disability: Unknown.
16. Value necessary medical aid paid to date by employer/insurer? None.

Employee: Eric Williamson

Injury No. 03-076753

17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$899.57.
19. Weekly compensation rate: \$599.71.
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: Permanent total disability benefits of \$599.71 per week commencing February 2, 2008, MINUS a credit of \$10,000.00 for advance payments.
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: Weekly permanent total disability benefits for Employee's lifetime, and medical benefits for Employee's lifetime.

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:

Mark Gonnerman

Employee: Eric Williamson

Injury No. 03-076753

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Eric Williamson

Injury No: 03-076753

Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Emery Sapp & Sons, Inc.

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

Additional Party: N/A

Insurer: General Casualty Company of Wisconsin

Checked by: RJD/cs

ISSUES DECIDED

The evidentiary hearing in this case was scheduled before the undersigned administrative law judge on August 18, 2009 in Columbia. At the close of the evidence, the parties requested leave to file post-hearing briefs, which leave was granted. The case was submitted on September 15, 2009. The hearing was held to determine the following issues:

1. The nature and extent of Employee's permanent disability (Employee alleges that he is permanently and totally disabled); and
2. Whether attorney's fees and costs should be ordered pursuant to Section 287.560.

STIPULATIONS

The parties stipulated:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That the accident occurred in Clark County, Missouri, and the parties agreed to hold the hearing in Columbia, Boone County, Missouri;
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;

Employee: Eric Williamson

Injury No. 03-076753

5. That the average weekly wage is \$899.57, with compensation rates of \$599.71/\$340.12;
6. That the notice requirement of Section 287.420, RSMo, is not a bar to Claimant's Claim for Compensation;
7. That Claimant sustained an accident arising out of and in the course of his employment with Emery Sapp & Sons, Inc. on April 7, 2003;
8. That General Casualty Company of Wisconsin fully insured the Missouri Workers' Compensation liability of Emery Sapp & Sons, Inc. at all relevant times;
9. That Employer/Insurer made an advance payment to Employee in the amount of \$10,000.00 which shall be treated as a credit against benefits awarded in the award herein; and
10. That an order of future medical benefits, pursuant to Section 287.140, RSMo, shall be made a part of the award herein.

POST-HEARING MOTION

On September 15, 2009, Employee filed a MOTION TO RE-OPEN EVIDENTIARY RECORD. That motion was overruled by written Order dated September 17, 2009.

EVIDENCE

The evidence consisted of the testimony of Claimant, Eric Williamson; the testimony of Walter Williamson, Jr.; the testimony of Jennifer Williamson; the deposition testimony of Jeff Preston; the deposition testimony of Peter Grathwohl; the deposition testimony and report of Dr. Wayne Stillings; the deposition testimony and report of Gary Weimholt, a vocational rehabilitation consultant; the deposition testimony and report of Dale Albert Halfaker, Ph.D.; the reports of Michael Dreiling, a vocational consultant, and the deposition testimony of Michael Dreiling taken on July 28, 2008 and on October 13, 2008; the deposition testimony and report of James England, Jr., a vocational rehabilitation counselor; reports of Dr. Joel Shenker, a neurologist; and additional medical records.

Employee: Eric Williamson

Injury No. 03-076753

DISCUSSION

Claimant, Eric Williamson, was born on May 12, 1971. He attended college for over four years, but left just short of a degree. Employer, Emery Sapp and Sons, Inc., is a general contractor that handles large commercial concrete and paving jobs. Claimant worked for Employer for a few summers while in high school and college. He also worked as a bouncer and doorman at a bar during college. He worked full-time for Sears, Roebuck & Co. for two years before going to work as a full-time employee for Employer. Claimant started as a laborer, then was promoted to concrete finisher, and further promoted to foreman.

As stipulated, Claimant sustained an accident arising out of and in the course of his employment with Employer on April 7, 2003. The accident occurred as Claimant's crew was assisting another crew on a bridge job in extreme northeast Missouri. This was not a typical job for Claimant as his crew usually performed work on intersections and cul-de-sacs. Claimant fell approximately forty feet from the bridge to the large rocks below. Claimant had multiple injuries including a head injury. Claimant had loss of consciousness and seizure symptoms immediately after the accident. He was taken to a hospital in Keokuk, Iowa, where he was diagnosed with a skull fracture, subdural hematoma, right wrist fracture, left clavicle fracture, and multiple transverse process fractures of the spine. He was transferred to Blessing Hospital in Quincy, Illinois, where he underwent an emergency craniotomy. On April 10, 2003, Claimant was transferred to Boone Hospital Center in Columbia, and on April 17, 2003, he was transferred to Rusk Rehabilitation Center in Columbia.

On May 9, 2003, Claimant was discharged from Rusk. His discharge diagnoses were left epidural hematoma status-post evacuation, traumatic brain injury, cognitive deficits in memory, language and executive functioning, and anger management issues. He was also diagnosed with a left clavicle fracture and a right distal radius fracture. Claimant was to continue taking anti-convulsant medications and anti-anxiety medications. Claimant was to continue with occupational therapy, speech therapy and physical therapy.

In June 2003 there was an incident of Claimant becoming physically violent with his wife (now ex-wife). In September 2003, Claimant was re-admitted to Rusk Rehabilitation Center because of ongoing anger management issues. In December 2003, Claimant began working again for Employer on a part-time basis as a general laborer. Claimant's uncle, Pete Grathwohl, is part owner of Emery Sapp & Sons, Inc. Grathwohl wanted Claimant to attempt a return to work and was willing to work with Claimant despite his shortcomings.

According to the testimony of Grathwohl and the testimony of Jeff Preston (who was Claimant's supervisor after Claimant's post-accident return to work), there were numerous complaints from multiple sources about Claimant's work. Those complaints included Claimant wandering away from the job site, leaving the job site at lunch time and forgetting where he was

Employee: Eric Williamson

Injury No. 03-076753

supposed to be after lunch, failure to maintain equipment, abuse of equipment, frequent accidents with a company truck, damaging large sections of concrete (including curbs and gutters) as a backhoe operator, incomplete and/or faulty paperwork, and major safety violations. For approximately one year prior to his discharge by Employer in February 2008, Claimant worked as a concrete saw foreman. This job was simple and straightforward. Claimant was to make saw cuts in finished concrete, and he was to maintain his saw and sawblades. Claimant did not supervise any other employees in this position; in fact, Claimant was assigned a “helper”, Drew Harrison, whose job was to keep Claimant focused and on task. Even with the assistance of Harrison, Claimant still had numerous problems on the job, coming in late or not at all, leaving saw blades on the job site, ruining a \$20,000 saw by running it without filters, making cuts too deep, making cuts in the wrong places, and others.

In early 2008, Claimant had “run out of rope” with Employer. Claimant had become a significant financial and safety liability for Employer. Grathwohl met with Claimant on February 1, 2008 and advised him that he was no longer employed. Later that month, Grathwohl met with Claimant and Dr. Jon Rupright, medical director of the Traumatic Brain Injury Rehabilitation Program at Rusk Rehabilitation Center. At this point, Claimant’s wife had filed for dissolution of their marriage. Claimant, Grathwohl and Dr. Rupright discussed Claimant’s marital problems and Claimant’s on-the-job problems. According to Claimant’s testimony, the meeting was “an eye-opener” for Dr. Rupright. According to the testimony of both Claimant and Grathwohl, Dr. Rupright advised Claimant to file for Social Security disability benefits.

Claimant’s marriage was dissolved in August 2008. Claimant lived with his mother and step-father for a few months and now lives alone in an apartment. Claimant has not been employed since February 2008. Claimant’s uncle, Pete Grathwohl, has tried to give Claimant some work doing maintenance on his rental properties. He also does some yard work for his aunt. This work is infrequent. Claimant takes “an abnormal amount of time” to do the work. He naps while working and quits when he wants. Other than the small amount of money he receives from his uncle and aunt for this work, Claimant lives off of a monthly allowance from his mother. According to the testimony of Claimant’s father, Walter, and the testimony of Claimant’s ex-wife, Jennifer, Claimant, who used to be “the life of the party”, now has no friends. Claimant’s only social network is his mother, father, step-father, step-mother and his brother David. Claimant is scheduled to have his two children every other weekend.

Claimant volunteers with Columbia Wrestling Club. The director of the club is Mike Flanagan. This is a club for children ages five through fourteen. Claimant described his position with the club as “his (Coach Flanagan’s) practice dummy”. Claimant travels to tournaments with the club. He doesn’t drive. He will coach some individual matches at tournaments. Claimant occupies most of his time with watching television, napping, and visiting at his mother’s home.

Employee: Eric Williamson

Injury No. 03-076753

According to Claimant's testimony and Claimant's father's testimony, Claimant doesn't cook as he is "deathly afraid" of leaving the stove on and causing a fire. Claimant believes he has no organizational skills. When asked about his employability, Claimant testified: "I don't think I can (work); I think I could try, I don't think I could last". Claimant testified that he could not operate a cash register because he "wouldn't remember how to use it". He testified that he could not work as a janitor because a janitor "basically works alone; I would forget what I was doing". Claimant testified that he did not believe he could perform assembly line work because of his vision and his inability to pay attention and focus.

Claimant's ex-wife testified about Claimant's lack of stamina and fatigability. She testified that when Claimant returned to work after the 4/7/03 accident, he was so fatigued that he would go to sleep as soon as he returned home from work, and would sleep all weekend. She testified that it was her responsibility to get Claimant up and ready for work and out the door, and the process was extremely difficult.

Prior to the April 7, 2003 accident, Claimant had no physical or mental disabilities. Currently, Claimant's only significant physical disability stemming from the 4/7/03 accident is the loss of upper right quadrant vision in both eyes. Claimant testified that he believes he has made a satisfactory recovery from his right wrist fracture and that the only remaining problem from his left clavicle fracture is a "bump" on his clavicle. The crucial questions in this case center around Claimant's traumatic brain injury and to what degree the effects of the brain injury affect Claimant's employability.

When Dr. Rupright released Claimant from his care in May 2005, he noted Claimant had problems with fatigue, depression, anxiety, memory and cognitive impairments. Dr. Rupright gave impairment ratings of 15% of the body as a whole for the loss of visual fields, 10% of the body as a whole for sleep and arousal impairments, 15% for memory and cognitive impairments, 15% for emotional instability, and 5% for sexual dysfunction. Dr. Wayne Stillings, a psychiatrist, evaluated Claimant at the request of Claimant's attorney, and testified by deposition. Dr. Stillings testified to his belief that Claimant sustained a severe traumatic brain injury, resulting in dementia, depression and personality change. On mental status examination, Dr. Stillings found that Claimant had problems with word retrieval, had reduced verbal fluency, very slow psychomotor speed and poor concentration. Dr. Stillings opined that, due to the severity of the head injury, Claimant would be unable to sustain himself occupationally and is not retrainable due to cognitive deficits. Dr. Stillings testified to his opinion that Claimant sustained a 75% permanent partial psychiatric neurological disability.

Employer-Insurer had Claimant evaluated by Dr. Dale Halfaker, a Springfield psychologist. Dr. Halfaker agreed with Dr. Stillings' diagnoses; Dr. Halfaker found that, from a psychiatric standpoint only, Claimant had sustained a 15% permanent partial disability. Dr. Halfaker testified to his belief that Claimant has the neuropsychological abilities to return to

Employee: Eric Williamson

Injury No. 03-076753

“simple” employment, that is “routine functions, avoiding hazardous activities” and working in “a less socially demanding work environment”.

Michael Dreiling, a vocational specialist, testified by deposition on behalf of Employer-Insurer. Dreiling was actually deposed on two separate occasions. Between the first and second depositions, Dreiling had been furnished with the transcripts of the depositions of Pete Grathwohl and Jeff Preston. Dreiling’s testimony can be summarized as follows: brain-injured persons are difficult to work with, and it is extremely difficult to find an employer who is willing to work with and accommodate a brain-injured employee. Dreiling testified that Claimant had no transferrable skills and that his educational skills were “fairly well-diminished”. Dreiling testified that Claimant might be a candidate for simple, rote, repetitive, entry level unskilled work; Dreiling also testified that while it is possible some employer might hire Claimant for such a position, Dreiling had serious doubts whether Claimant could maintain employment.

Jim England, a vocational rehabilitation specialist, also testified on Employer-Insurer’s behalf. England essentially agreed with Dreiling’s analysis. England did not testify that Claimant could in fact compete in the open market for employment, but that there was a “hope” that Claimant could find and maintain employment, albeit with significant vocational assistance. England suggested that Claimant could return to school and learn other job skills.

Gary Weimholt, a vocational rehabilitation specialist, testified on Claimant’s behalf. Weimholt testified that Claimant had no transferrable skills, and that because of Claimant’s cognitive impairments he could not learn new job skills or be retrainable. Weimholt testified that Claimant was totally disabled and cannot compete in the open market for employment.

The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant’s condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999) (overruled on other grounds). An employer must be reasonably expected to hire the claimant, given the claimant’s current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003) (overruled on other grounds). The overwhelming evidence in this case leads to the inescapable conclusion that Eric Williamson is not able to competently compete in the open labor market. It is abundantly clear that no employer would reasonably be expected to hire Claimant, nor reasonably expect him to successfully perform his work duties.

The fact that Claimant worked for Employer for approximately four years post-accident is not proof that Claimant can compete in the open market for employment; in fact, the opposite is true. Claimant did not obtain this employment by competing in the open labor market. Emery Sapp & Sons, Inc. gave Claimant infinitely more opportunities and second chances than it would have afforded any other employee, in part because Employer felt sorry for its seriously-injured employee and in part because Pete Grathwohl is Claimant’s uncle. It could be seriously argued

Employee: Eric Williamson

Injury No. 03-076753

that Claimant's post-injury employment was actually an extended experiment to see if Claimant could be vocationally rehabilitated. The experiment failed; even the addition of a "job coach" (Claimant's "helper", Drew Harrison) could not prevent its failure.

I find that Claimant is permanently and totally disabled as a result of the work-related accident of April 7, 2003.

I find no grounds for an award of costs and attorney's fees in this matter. Section 287.560, RSMo provides that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them. The term "whole cost of the proceedings" as used in Section 287.560 includes attorney's fees. *Landman v. Ice Cream Specialties*, 107 S.W.3d 240 (Mo. 2003).

Employer and Insurer have stipulated to every issue in this case (including stipulating that an order of future medical benefits should be made), save one: whether Claimant is permanently and totally disabled. However, numerous cases over the years have made it clear that the nature and extent of permanent disability is a finding of fact within the special province of the trier-of-fact. See, e.g., *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo. App. 1997); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989); *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); *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo.App. 1986); and *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983). Further, section 287.260 states that costs *may* be assessed. This means that the assessment of costs is permissive, not mandatory. This suggests to me that the division (i.e., administrative law judge) or commission should determine whether the party acted in bad faith before assessing costs. There is no bad faith in this case. Employer has acted in an exemplary manner in this case in all respects, including, but not limited to, bending over backwards for Claimant for over four years in an attempt at vocational rehabilitation.

Employer and Insurer are responsible for the payment of permanent total disability benefits of \$599.71 per week. There is a question as to *when* those payments should begin. In most instances, those benefits would be payable after the employee's condition has reached maximum medical improvement. The medical records in this case would indicate that Claimant's condition likely reached maximum medical improvement in early 2005; however, Claimant was receiving paychecks from Employer at that time while Employer was making a *bona fide* attempt at vocational rehabilitation for Claimant. It smacks of a certain unfairness to require Employer to pay permanent total disability benefits for the same period it paid Claimant's wages in a *bona fide* attempt at rehabilitation. Therefore, I find that Employer and Insurer's liability for weekly benefits should begin on February 2, 2008, the day after Claimant was let go by Employer. As of November 13, 2009, 93 weeks of benefits have accrued, totaling \$55,773.03. As stipulated, Employer and Insurer are entitled to a credit of \$10,000.00. After

Employee: Eric Williamson

Injury No. 03-076753

applying the credit, Employer-Insurer's liability for permanent total disability benefits between February 2, 2008 and November 13, 2009 is \$45,773.03.

The parties stipulated that the Award herein shall include an order requiring Employer and Insurer to provide lifetime medical benefits for Claimant pursuant to the requirements of Section 287.140. The medical evidence clearly supports such an order.

FINDINGS OF FACT

In addition to those facts to which the parties stipulated, I find the following facts:

1. Claimant, Eric Williamson, sustained a work-related accident while employed with Employer, Emery Sapp & Sons, Inc., on April 7, 2003, as a result of a 40' fall from a bridge;
2. Claimant sustained multiple injuries in the accident, including a traumatic brain injury;
3. As a result of the traumatic brain injury, Claimant continues to experience fatigue, depression, anxiety, memory and cognitive impairments, reduced verbal fluency, very slow psychomotor speed and poor concentration;
4. From December 2003 through January 2008, Claimant returned to work for Employer, first on a part-time basis, later on a full-time basis;
5. Because of Claimant's traumatic brain injury and its consequences, Claimant's attempt at return-to-work was marred by problems in Claimant's behavior, including wandering away from the job site, leaving the job site at lunch time and forgetting where he was supposed to be after lunch, failure to maintain equipment, abuse of equipment, frequent accidents with a company truck, damaging large sections of concrete with a backhoe, incomplete and/or faulty paperwork, major safety violations, and ruining a \$20,000 saw by running it without filters;
6. Claimant's return-to-work attempt failed, even after Claimant had been assigned a "helper", whose job was to keep Claimant focused and on task, and Claimant's employment was terminated on February 1, 2008;
7. Claimant has not been employed since February 1, 2008;
8. No employer in the usual course of business would reasonably be expected to employ Claimant in his present physical, mental and psychological condition, reasonably expecting Claimant to perform the work for which he would be hired;
9. Claimant is unable to compete in the open market for employment; and
10. Claimant continues to be in need of medical and psychiatric treatment.

RULINGS OF LAW

Employee: Eric Williamson

Injury No. 03-076753

In addition to those legal conclusions to which the parties stipulated, I make the following rulings of law:

1. Claimant, Eric Williamson, is permanently and totally disabled;
2. Claimant's status of permanent and total disability was caused by the work related accident of April 7, 2003;
3. Claimant is entitled to permanent total disability benefits of \$599.71 per week, beginning February 2, 2008;
4. As of November 13, 2009, 93 weeks of benefits have accrued, totaling \$55,773.03;
5. Employer-Insurer is entitled to a credit of \$10,000.00 against the accrued benefits;
6. Claimant requires future medical and psychiatric treatment, pursuant to Section 287.140, RSMo, to cure and relieve him from the effects of the work-related accident of April 7, 2003;
7. No grounds exist for an award of costs and attorney's fees; and
8. Claimant's attorney, Mark Gonnerman, has provided valuable legal services for Claimant in the prosecution of this case, and is entitled to an award of attorney's fees in the amount of 25% of all past and future amounts awarded for permanent total disability benefits.

ORDER

Employer, Emery Sapp & Sons, Inc., and Insurer, General Casualty Company, are ordered to pay to Claimant the amount of \$45,773.03 for permanent total disability benefits accrued through November 13, 2009; Employer and Insurer are further ordered to pay Claimant permanent total disability benefits of \$599.71 per week commencing November 14, 2009, for Claimant's lifetime. Employer and Insurer are further ordered to provide Claimant with medical treatment, as contemplated by Section 287.140, RSMo, for Claimant's lifetime.

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

Employee: Eric Williamson

Injury No. 03-076753

Date: November 16, 2009

Made by: /s/Robert J. Dierkes

ROBERT J. DIERKES
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Naomi Pearson

Naomi Pearson
Division of Workers' Compensation