

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

Injury No.: 09-045401

Employee: Barry Wimberly

Employer: Western Fireproofing Company of Kansas, Inc.

Insurer: Liberty Insurance Corporation

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 30, 2012. The award and decision of Administrative Law Judge Emily S. Fowler, issued November 30, 2012, 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 10th day of July 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD AS TO THE EMPLOYER/INSURER AND THE SECOND INJURY FUND

Employee: Barry Wimberly Injury No. 09-045401
Dependents: N/A
Employer: Western Fireproofing Company of Kansas, Inc.
Insurer: Liberty Insurance Corporation
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: October 5, 2012 Checked by: ESF/pd

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: June 10, 2009
5. State location where accident occurred or occupational disease was contracted: Kansas City, Wyandotte County, Kansas. The parties stipulated that the contract of employment was created in Kansas City, Jackson County, Missouri.
6. Was above Employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: A fellow employee dropped a hose weighing between 100 and 200 pounds from a 25 to 30 foot roof onto claimant's head breaking claimant's neck resulting in permanent injury to the neck and body as a whole.

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: Neck and body as a whole
14. Claimant is permanently and totally disabled as a result of the last accident alone.
15. Compensation paid to date for temporary disability: \$13,225.25 as of the date of hearing. Employer/Insurer stipulates that a \$6,088.25 in underpayment of temporary total disability benefits occurred.
16. Value necessary medical aid paid to date by employer/insurer? \$77,460.04
17. Value necessary medical aid not furnished by employer/insurer? \$4,975.42
18. Employee's average weekly wages: \$1,390.72
19. Weekly compensation rate: \$772.53/\$404.66
20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: As stated above, the employer has agreed to pay \$6,088.25 in past due temporary total disability benefits plus the employer/insurer is ordered to pay past due permanent total disability benefits of \$120,956.13 as of November 2, 2012 and \$772.53 per week thereafter, for the remainder of claimant's life.
22. Future requirements awarded: Ongoing pain management plus any revision surgery necessary to cure the effects of the claimant's injury to his neck.

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Barry Wimberly Injury No. 09-045401
Dependents: Deborah Wimberly
Employer: Western Fireproofing of Kansas, Inc.
Insurer: Liberty Insurance Corporation
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: October 5, 2012 Checked by: ESF/pd

On October 5, 2012, the parties appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110.2. The Employee, Barry Wimberly, appeared in person and with counsel, Keith V. Yarwood. The Second Injury Fund appeared through Assistant Attorney General, Andrew Dickson. The employer and insurer appeared through counsel, C. Anderson Russell.

STIPULATIONS

The parties stipulated to the following:

- 1) that the Employer, Western Fireproofing of Kansas, Inc., was an employer operating under and subject to the provisions of Missouri Workers' Compensation Law on June 10, 2009 and was fully insured by Liberty Insurance Corporation;
- 2) that Barry Wimberly was its employee and working subject to the law in Kansas City, Wyandotte County, Kansas;
- 3) Missouri's jurisdiction to hear this case is pursuant to §287.110.1 in that the contract of employment was created in Kansas City, Jackson County, Missouri;
- 4) the Employee sustained an accident or occupational disease arising out of and in the course and scope of his employment;
- 5) that Employee notified Employer of his injuries as required by law and his Claim was filed within the time allowed by law;
- 6) that Employee's average weekly wage was \$1,390.72, resulting in a compensation rate of \$772.53 for temporary total disability and \$404.66 for permanent partial disability compensation; and
- 7) that the Employer has paid has paid medical care costing \$77,460.04 and temporary total disability compensation in the amount of \$13,225.25 and stipulates that that represents a temporary total disability benefits underpayment of \$6,088.25.

ISSUES

The issues to be resolved by this hearing are as follows:

- 1) The nature and extent of Claimant's disability;
- 2) Employer's liability;
- 3) Second Injury Fund liability; and
- 4) Unpaid medical expenses of \$4,975.42.

FINDINGS OF FACT AND RULINGS OF LAW

The Employee, Barry Wimberly, testified in person and offered the following exhibits, all of which were admitted into evidence without objection with the exception of Claimant's Exhibit E which was overruled:

Claimant's Exhibit A – Deposition of Dr. P. Brent Koprivica
Claimant's Exhibit B – Deposition of Dr. Stanley Butts, Ph.D.
Claimant's Exhibit C – Deposition of Michael Dreiling
Claimant's Exhibit D – Section 334.107 RSMo.
Claimant's Exhibit E – Healing Art website print-out
Claimant's Exhibit F – Barry Wimberly's prescription records
Claimant's Exhibit G – Drug Test post accident
Claimant's Exhibit H – TENS Unit expenses

The Second Injury Fund did not call any witnesses and offered no exhibits.

The Employer/Insurer offered the following exhibits without objection with the exception of Exhibit 6 which was overruled:

Employer/Insurer Exhibit 1 – Deposition of Dr. Halfaker
Employer/Insurer Exhibit 2 – Deposition of James England
Employer/Insurer Exhibit 3 – Deposition of Dr. Stephen Reintjes
Employer/Insurer Exhibit 4 – Deposition of Dr. Norbert Belz
Employer/Insurer Exhibit 5 – Deposition of Barry Gene Wimberly
Employer/Insurer Exhibit 6 – Prescription records of Barry Wimberly prior to reaching maximum medical improvement

Based on the above exhibits and the testimony of the Mr. Wimberly, I make the following findings:

Mr. Wimberly is a 54-year-old male who lives with his wife of more than 30 years in Bethany, Missouri. Western Fireproofing of Kansas, Inc. hired him as a laborer at the end of May, 2009. On June 10, 2009, he met with an accident that resulted in permanent injury while working in Kansas City, Wyandotte County, Kansas. At the time he had an average weekly wage of \$1,390.72 which entitles him to a permanent total disability rate of \$772.53 and a permanent partial disability rate of \$404.66.

I further find that prior to June 10, 2009 Mr. Wimberly suffered injuries which included a right rotator cuff tear, a low back strain, three broken ribs, a fractured vertebrae in the low back and a fractured right ring finger.

Mr. Wimberly dropped out of high school at the age of 16 and went to work at the General Motors plant in Fairfax, KS. He worked in various line positions as well as an employee representative while at GM. He eventually obtained his GED and obtained an Associates Degree from Park College. He obtained Employee's Assistant Certification. Mr. Wimberly worked as an employee assistance counselor at GM for about nine years but has not updated his credentials or received any continuing education in the area for more than a decade. He has masonry skills and utilized them periodically during plant shut-downs while working at General Motors. However, he has neither typing skills nor personal computer skills. (Claimant Exhibit C, pp. 67-71). In the 1990's, he and his wife, Deborah Wimberly, purchased a 60 acre farm near Bethany, Missouri where they rehabilitated a 100 year old house and took care of a variety of animals including more than 20 cows and six horses.

Prior to June 10, 2009, Mr. Wimberly suffered several injuries however none of them resulted in any permanent industrial disability. In 2004, while on vacation with his family in Colorado, the horse he was riding threw him causing him to break three ribs, his right ring finger and to fracture a vertebra in his low back. Although doctors wanted to perform surgery on his finger Mr. Wimberly refused and he completely healed after a regimen of pain medication and physical therapy.

In December of 2006, Mr. Wimberly lost control of his vehicle while driving to work. He crossed the median and was struck by another vehicle. His car came to rest in a ditch. Mr. Wimberly complained of neck pain and diagnostic studies showed that he suffered from arthritis in his neck. He was provided some pain medication but fully recovered without any permanent disability.

In the summer of 2008, after retiring from General Motors, Mr. Wimberly tore his right rotator cuff while working on his farm. He delayed surgery on his shoulder for six months so that he could assist his siblings in caring for his dying father. Eventually, Mr. Wimberly did undergo a right rotator cuff repair with Dr. Vilkins. He was released from treatment in March of 2009. However, he continued to obtain pain medication from his private physician, Dr. Terry Hall. Mr. Wimberly took the medication periodically to relieve his shoulder pain so he could sleep.

Other pre-existing conditions of note include alcoholism and depression. Mr. Wimberly is a recovering alcoholic. However, his wife gave him an ultimatum in 1988 which resulted in Mr. Wimberly drinking his last alcoholic beverage on October 4th of that year and entering into a 28 day rehabilitative program. Mr. Wimberly testified that giving up alcohol actually made him a better employee and he does not consider it a disability.

Mr. Wimberly was also diagnosed with a pre-existing depression. However, Mr. Wimberly was not aware of the diagnosis but admitted that he had sought counseling with a psychiatrist to help him stop smoking. The psychiatrists hired by Mr. Wimberly's counsel and by opposing counsel agreed that Mr. Wimberly suffered from depression prior to his work injury

on June 10, 2009. However, Mr. Wimberly denied missing work due to depression prior to his last injury.

On May 29, 2009, Mr. Wimberly went to work for Western Fireproofing of Kansas, Inc. as a laborer. Western Fireproofing of Kansas, Inc. treats flat roofs to protect buildings in case of fire. The process includes transporting a type of cement from the ground to the roofs of the building via six-inch diameter hoses. The hoses, while empty, weigh between 100 and 200 pounds. They are too heavy to lift when they are full of cement.

On June 10, 2009, Mr. Wimberly and the other workers were at a school in Kansas City, Wyandotte County, Kansas cleaning up at the end of the day. Mr. Wimberly and a co-worker were standing on the ground when another co-worker threw the hose from the roof approximately 25 to 30 feet above. The hose struck Mr. Wimberly's co-work in the arm and struck Mr. Wimberly in the head causing him to fall to the ground. The impact broke Mr. Wimberly's hard hat.

An ambulance took Mr. Wimberly to North Kansas City Hospital where Dr. Stephen Reintjes performed an evaluation. Dr. Reintjes identified a right C6-C7 facet fracture with subluxation and recommended neck fusion surgery. (Claimant Exhibit A, pp. 122). On June 30, 2009 Dr. Reintjes performed a C6-7 posterior cervical fusion with lateral mass plates and allograft; right C6-7 foraminotomy; open reduction; and microdissection. (Claimant's Exhibit A, pp. 122-124).

On November 2, 2009, Dr. Reintjes offered to release Mr. Wimberly with a permanent 35 pound lifting restriction. However, Mr. Wimberly requested that he increase the restriction to 50 pounds so that he could return to work. Dr. Reintjes also placed permanent restrictions on Mr. Wimberly of limited overhead work and limited crawling and climbing and instructed Mr. Wimberly to avoid activity that risks trauma to his head or neck. He assigned a 15% permanent partial disability to the body as a whole. (Employer/Insurer Exhibit 3, Reintjes deposition, 13:14-13:24; Claimant deposition A, page 184).

After his release, Mr. Wimberly contacted Western Fireproofing about returning to work but never received a response. He also tried to go to work in a local auto repair shop as a helper but they could not hire him because of his limitations. He applied for a job at a local auto parts shop but never received a response and he contacted the brick mason he had worked for periodically over the previous three decades but was told he would not be hired.

Mr. Wimberly has had significant difficulties since his release from treatment. At the hearing Mr. Wimberly testified that walking a mile or lifting items even under 50 pounds can increase his pain to as high as an 8 on a scale of 10. Simply getting ready in the morning, shopping or doing light housework results in pain levels as high as a 6. He testified that he can sit for less than an hour, stand for about 30 minutes, cannot walk for even an hour and any attempted activity results in several days of pain. Mr. Wimberly suffers numbness in both upper extremities although it is greater on the right side than the left. His hands become numb if he drives too far. He has ongoing weakness in his right arm even though he is right hand dominant and cannot perform any work above his head. He complains of severe ongoing neck pain and swelling on the right side of his neck after activities. He continues receiving pain medications

from his private physician who has also prescribed a TENS unit to be used on his neck. (See Claimant Exhibit F).

On March 3, 2010, Dr. P. Brent Koprivica performed an independent medical evaluation. Waddell testing showed Mr. Wimberly was appropriate in all 5 categories for symptom magnification. (Exhibit A, pp. 79 and 80). However, he believed that Mr. Wimberly's injury had made him depressed and referred him for a formal mental evaluation. He noted that Mr. Wimberly continued to receive narcotic medications from his family physician and suggested a multi-disciplinary approach for his chronic pain management. He also opined that Mr. Wimberly is at significant risk of adjacent segment disease at the C5-C6 and the C6-T1 levels of the spine.

Based on the injuries of June 10, 2009, Dr. Koprivica placed the following restrictions on Mr. Wimberly:

1. no above shoulder girdle activities of a weighted variety;
2. avoid repetitive or sustained activities above the shoulder girdle level, even if unweighted;
3. no climbing;
4. avoid activities that might jar the head or neck such as commercial driving or operating heavy equipment;
5. avoid repetitive pushing or pulling activities;
6. avoid reaching activities;
7. only occasional lifting or carrying of up to 50 pounds;
8. avoid frequent or constant bending at the waist;
9. avoid pushing, pulling or twisting;
10. avoid sustained or awkward postures of the lumbar spine; and
11. Maintain the ability to change between sitting, standing and walking as needed.

Dr. Koprivica concluded that if Mr. Wimberly is permanently and totally disabled it is a result of the last accident alone. (Claimant Exhibit A, pp. 85-87).

The Employer/Insurer retained Dr. Norbert Belz to conduct an independent medical evaluation on Mr. Wimberly on October 7, 2011. He placed the following restrictions on Mr. Wimberly:

1. no activity above the shoulder level;
2. no sustain cervical extension in excess of 30 degrees for more than half of a work cycle;
3. no sustained cervical flexion in excess of 20 degrees for more than half a work cycle;
4. no operating of an overhead crane;
5. no performing of close tedious work;
6. do not lift more than 50 pounds;
7. no activities that result in whole body vibrations such as would occur with over-the-road 18 wheeler operations or the operation of heavy equipment uneven terrain;
8. do not engage in forceful restraints or take-downs.

He assigned a 30 to 35% permanent partial disability to the body as a whole. (Employer/Insurer Exhibit 4, Belz deposition Exhibit 1, pp. 22). Dr. Belz accused Mr. Wimberly's personal physician, Dr. Terry Hall, of unnecessarily prescribing pain medications. However, as of the date of the hearing Dr. Belz had not filed a complaint with Missouri State Board of Registration for Healing Arts. (See Employer/Insurer Exhibit 4, Belz deposition 74:7-74:17; Claimant Exhibit D, Claimant Exhibit E, Claimant Exhibit H).

Although Dr. Belz assigned a 7.5% to 10% permanent partial disability to the body as a whole for psychological disability, Dr. Belz acknowledged that he has no specialized training in psychology or psychiatry. (Belz deposition Exhibit 1, pp. 23; Employer/Insurer Exhibit 4, 76:8-76:17).

Mr. Wimberly's counsel retained Dr. Stanley Butts, Ph.D., to perform a psychological evaluation and the Employer/Insurer retained Dr. Dale Halfaker, Ph.D., to perform its psychological evaluation. They reached similar conclusions.

Both concluded that Mr. Wimberly suffers from a pain disorder with both psychological factors and general medical condition. Dr. Butts diagnosed depression whereas Dr. Halfaker diagnosed a dysthymic disorder. Dr. Halfaker also diagnosed alcohol dependence in full sustained remission and a personality disorder NOS. (Claimant's Exhibit B, pp. 130; Employer/Insurer Exhibit 1, 55:2 - 56:24).

Neither doctor believes that Mr. Wimberly exaggerates his pain. Dr. Butts's testing shows Mr. Wimberly tends to present himself in the most favorable light possible and actually minimizes the role pain plays in his life. (Claimant Exhibit B, 107:20-109:12). Dr. Halfaker's testing shows Mr. Wimberly was truthful in his interview and actually feels the pain that he reports. Dr. Halfaker's testing also shows Mr. Wimberly is likely to continue experiencing pain on a permanent basis. (Employer/Insurer Exhibit 1, 68:11-69:12; 76:9-76:15).

Dr. Halfaker believes Mr. Wimberly would return to work if he could but Mr. Wimberly's pain disorder would distract him and cause him to fatigue more easily. It would also affect his ability to learn new tasks and perform the tasks that he already knows. (Employer/Insurer Exhibit 1, 84:4-85:10).

Dr. Butts assigned a global assessment of functioning (GAF) of 35 while Dr. Halfaker assigned a GAF of 51. (Claimant's Exhibit B, 39:7-40:8; Employer/Insurer Exhibit 1, deposition Exhibit 2, pp. 37). A GAF score of 50 or less indicates a severe condition. (Employer/ Insurer Exhibit 2, 25:10-25:20). Dr. Butts assigned a pre-existing psychological disability of 20% to the body as a whole and 25% permanent partial disability for the work related injury of June 10, 2009. (Claimant Exhibit B, pp. 130-131). However, he opines that Mr. Wimberly would suffer from both the pain disorder and depression even if he had no psychological problems before June 10, 2009. He notes that Mr. Wimberly was seen by a psychiatrist prior to the accident and the psychiatrist did not consider depression to be an issue. Dr. Butts concluded that Mr. Wimberly is permanently and totally disabled as a result of the last accident alone. (Claimant's Exhibit B, 50:4-51:11; p. 129).

While Dr. Halfaker does not believe Mr. Wimberly is permanently and totally disabled, he agrees that the injury of June 10, 2009 was sufficient to cause Mr. Wimberly's pain disorder regardless of his preexisting psychological condition and the resulting chronic pain definitely would cause depression. (Employer/Insurer Exhibit 1, 72:8-72:19).

Dr. Halfaker assigned a 15 to 20% permanent partial disability to the body as a whole as a result of the June 10, 2009 work injury but admitted that a rating as high as 25% permanent partial disability to the body as a whole for the primary injury would be consistent with this opinion. He further opined that both pain and depression can also affect Mr. Wimberly's ability to concentrate. (Employer/Insurer Exhibit 1, 69:18-70:22; 83:8-83:14).

The Employer/Insurer retained Mr. James England to perform a vocational assessment. Mr. Wimberly's counsel retained Michael Dreiling to perform the same assessment.

Mr. England, concluded that if he considered only Dr. Reintjes's restrictions, Mr. Wimberly could perform a variety of jobs including working as a counselor in an employment assistance program, or production supervisor, or forklift operator, or janitor. He believes that even if he considered Dr. Koprivica's restrictions, Mr. Wimberly could still work as a supervisor, a counselor in an employment assistance program, courier, perform security work or work in customer service. (Employer/Insurer Exhibit 2, England deposition, 28:5-28:23). However, he stated that when considering Dr. Butts findings Mr. Wimberly would be permanently and totally disabled as a result of the last accident in combination with his preexisting conditions. (Employer/Insurer Exhibit 2, England deposition, 26:25-27:10).

However, Mr. England concedes that Mr. Wimberly's ability to concentrate despite his pain would be very important if he were to return to work as a counselor or a supervisor. (Employer/Insurer Exhibit 2, 33:2-33:14). Mr. England also acknowledged that a counselor's inability to focus and his propensity to fatigue easily would decrease his effectiveness and also adversely affect his ability to maintain employment. (Employer/Insurer Exhibit 2, 59:23-60:18). He agreed with Dr. Halfaker that it could be very difficult for someone dealing with constant pain to learn new tasks (Employer/Insurer Exhibit 2, 38:14-38:23).

He also acknowledges that working as a courier does pose some risks to Mr. Wimberly. The time he spends driving increases the likelihood that he will have to stop suddenly or be involved in an accident resulting in a jerking motion of the head and neck. He further acknowledged that there were not many courier jobs available to Mr. Wimberly in his small community in Missouri. (Employer/Insurer Exhibit 2, 35:10-36:20). He made no attempt to find actual work that Mr. Wimberly could perform. (Employer/Insurer Exhibit 2, 37:16-37:18).

Michael Dreiling identified fourteen tasks Mr. Wimberly performed for various employers in the fifteen years before his injury to determine what, if any, transferable skills Mr. Wimberly had to offer potential employers.

Mr. Dreiling testified that every assembly line task Mr. Wimberly performed while working for GM posed a risk of trauma to his head or neck in violation of Dr. Reintjes's restrictions. None of the tasks allowed Mr. Wimberly to change his sitting, standing and walking positions as needed as required by Dr. Koprivica. The tasks also violated both doctors' prohibition against lifting more than 50 pounds. (Claimant Exhibit C, 8:24-10:5; 11:14-12:3).

Similarly, his work as a brick mason put him at risk of neck and head trauma and performing work above his head violates Dr. Reintjes's restrictions. Under the restrictions, he could not assemble scaffolding or frequently lift 40 pounds. (Claimant Exhibit C, 14:12--15:20).

Clearly the work Mr. Wimberly performed at Western Fireproofing of Kansas, Inc., put him at risk for trauma to the head and neck in violation of Dr. Reintjes's restrictions. It also violates Dr. Koprivica's requirement that Mr. Wimberly be able to change positions as needed. It required heavy lifting and frequently required heavy pushing and pulling and constant standing and walking. (Claimant Exhibit C, 15:21-17:2).

According to Mr. Dreiling, the only tasks Mr. Wimberly could perform within the *physical* restrictions Dr. Reintjes and Dr. Koprivica placed on him were tasks from his time as a counselor. However, he did not believe those were transferable skills. Furthermore, he believed Mr. Wimberly's chronic pain and difficulty looking downward would make it hard for him to obtain further education. Those factors combined with Mr. Wimberly's lack of data entry skills, typing skills and computer skills make it extremely unlikely that even GM would hire him back in the Employee Assistance position given the position's current demands. (Claimant's Exhibit C, pp. 77-82; 19:14-19:25; 23:9-24:10; 36:1-36:10).

Due to the above factors, Mr. Dreiling concluded that Mr. Wimberly is permanently and totally disabled. (Claimant's Exhibit C, 24:21 – 25:4). It appears from his report and deposition that he draws this conclusion based upon the physical disabilities and restrictions caused by the last accident alone.

ANALYSIS

Claimant has the burden of proving all material elements of his claim. Fischer v. Archdiocese of St. Louis-Cardinal Richter Inst., 703 SW 2d 196 (Mo. App. E.D. 1990); overruled on other grounds by Hampton v. Big Boy Steel Erections, 121 SW 3d 220 (Mo. banc 2003); Griggs v. A.B. Chance Company, 503 SW 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 935 SW 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant met his burden of proof as set out above.

The Uncontroverted evidence is that on June 10, 2009 a fellow employee dropped an industrial hose weighing between 100 and 200 pounds off a 25 to 30 foot roof onto Mr. Wimberly's head. The impact broke Mr. Wimberly's hard hat and neck. Mr. Wimberly underwent surgery with Dr. Stephen Reintjes on June 30, 2009. Dr. Reintjes performed a C6-7 posterior cervical fusion with lateral mass plates and allograft; right C6-7 foraminotomy; open reduction; and microdissection. Dr. Reintjes offered to release Mr. Wimberly on November 2, 2009 with a 35 pound lifting restriction and limited overhead work and limited crawling and climbing. Mr. Wimberly requested that Dr. Reintjes increase the lifting restriction to 50 pounds so that he could return to work. Dr. Reintjes complied but Mr. Wimberly was unable to find employment.

PERMANENT TOTAL DISABILITY

Section 287.020.6, RSMo., provides: “The term ‘total disability’ as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident. The phrase ‘inability to return to any employment’ has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment.” Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo.App. 1982). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. Sullivan v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 (Mo.App. 2001), overruled in part on other grounds by Hampton, 121 S.W.3d at 225; Reiner v. Treasurer of the State of Mo., 837 S.W.2d 363, 367 (Mo.App. 1992), overruled in part on other grounds by Hampton, 121 S.W.3d at 229; and Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789, 792 (Mo.App. 1992). The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App. 1990); Reiner at 367; and Kowalski at 922. See also Thornton v. Hass Bakery, 858 S.W.2d 831, 834 (Mo.App. 1993).

Section 287.020.6 RSMo provides as a test for permanent total disability by determining whether an employee is able to compete in the open labor market. This is determined by establishing whether an employer, in the ordinary course of business, would be reasonably expected to hire the employee, given their present physical condition. Molder v. Mo. State Treasurer 342, S.W.3d 406, 411 (Mo. App. 2011). Section 287.020.6 defines “total disability” as the inability to return to work but is specifically not limited to return to employment in which the employee’ was previously engaged in, but considers whether the employee is able to perform the usual duties of the employment, and whether the employee’s situation and condition allows them to compete in the open labor market. *Id.*, at 411.

Section 287.220, RSMo., creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the fund in “[a]ll cases of permanent disability where there has been previous disability.” In deciding whether the fund has any liability, the first determination is the degree of disability from the last injury considered alone. Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 248 (Mo.banc 2003), overruled in part on other grounds by Hampton, 121 S.W. 3d at 224 (Mo banc 2003); Hughey v. Chrysler Corp., 34 S.W.3d 845, 847 (Mo.App. 2000). Accordingly, pre-existing disabilities are irrelevant until the employer’s liability for the last injury is determined. If the last injury in and of itself renders the employee permanently and totally disabled, then the fund has no liability and the employer is responsible for the entire amount of compensation. *Id.* at 248. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Reiner v. Treas. of State of Mo., 837 S.W.2d 363, 366 (Mo.App.1992); section 287.220.1 (“After the compensation liability of the employer for the last injury, considered alone, has been determined ..., the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined....”). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Landman, 107

S.W.3d at 248. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. *Id.* If the last injury in and of itself resulted in the employee's permanent, total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. *Id.*

Missouri Courts have made it clear that the tests for permanent total disability is whether an employer in the usual course of business would reasonably be expected to employ the injured worker in his current physical condition. Boyles v. USA Rebar Placement, Inc., 25 SW 3d 418 (Mo. App. W.D. 2000); Cooper v. Medical Center of Independence, 955 SW 2d 570 (Mo. App. W.D. 570); Hookman v. Henry Transportation, 924 SW 2d 286 (Mo. App. 1996).

Unfortunately, Western Fireproofing did not allow Mr. Wimberly to return to work for it. Mr. Wimberly applied for several other positions within his small community of Bethany, Missouri with no success. He even tried to leverage his 30-year work history with a local mason to get work. Unfortunately, not even an old friend would hire him.

Mr. Wimberly continued receiving pain management from his personal physician who eventually referred him to a specialist who prescribed a TENS unit. Mr. Wimberly uses the TENS unit on his neck to relieve pain. I found Mr. Wimberly's testimony both credible and compelling. More importantly, psychological tests administered by the employer/insurer's psychologist, Dr. Halfaker and Mr. Wimberly's psychologist, Dr. Butts confirm that Mr. Wimberly wants to return to work but he suffers from chronic debilitating pain due to Employee's injuries from the accident of June 10, 2009.

Although the treating surgeon, Dr. Stephen Reintjes, assigned only a 15% permanent partial disability to the body as a whole as a result of this injury his restriction that Mr. Wimberly should avoid activities that risk trauma to the head and neck limit Mr. Wimberly to essentially a sedentary level of activity. Again these restrictions were due to the last accident of June 10, 2009.

Despite Dr. Reintjes's restriction, the employer/insurer's vocational expert suggested that Mr. Wimberly could return to over-the-road truck driving, work as a forklift operator or as an assembly line supervisor. He even suggested that Mr. Wimberly could work as a security officer.

However, Dr. Belz specifically restricted Mr. Wimberly from activities that result in whole body vibrations such as would occur with over-the-road, 18 wheeler operations or heavy equipment on uneven terrain. Furthermore, Dr. Belz restricted him from engaging in forceful restraints or take-downs. It is unclear how Mr. Wimberly could work as a security officer without running the risk of having to forcefully restrain someone.

While acknowledging, that Mr. Wimberly's chronic pain would decrease his effectiveness in sedentary positions he had performed in the past as a counselor, Mr. England insisted that Mr. Wimberly could return to employment. Mr. England's conclusions are contrary to the Employer/Insurer's own medical and psychological experts' opinions

Employee's vocational consultant, Michael Dreiling concluded that Mr. Wimberly could not do any of his past jobs. Mr. Dreiling noted Mr. Wimberly's vocational history, his medical

restrictions and his verified pain complaints all hinder his ability to retrain and return to work. Mr. Wimberly testified to attempts to regain employment without success. Dr. Halfaker testified that he believes Mr. Wimberly legitimately wants to return to work. The evidence supported Mr. Dreiling's vocational opinions. Mr. Dreiling's conclusion that Mr. Wimberly was unemployable in the open labor market and that no employer would hire him is credible. I find Mr. Dreiling's opinions more credible than Mr. England's. Mr. Dreiling made his determinations based upon the restrictions from Dr. Reintjes and Dr. Koprivica which were based solely on the injuries sustained in the June 10, 2009 injury alone.

Mr. Wimberly proved that he was rendered permanently and totally disabled due solely to the injuries he sustained in the June 10, 2009 work accident. Thus, he proved his employer's liability for permanent total disability benefits. Although Employee had prior injuries it appears that they did not amount to any permanent disability. Further the Second Injury Fund's liability is not even reached herein as this Court has found Mr. Wimberly is permanently and totally disabled due to the injuries and subsequent disability he suffers from the accident of June 10, 2009 alone. Pursuant to the current case law if permanent total disability is found due to the last accident alone, there is no need to look at any prior disabilities when considering liability.

The evidence supports the medical restrictions as rendered by Dr. Koprivica, Dr. Reintjes, and Dr. Belz. When considering the rather significant physical restrictions Dr. Reintjes, Dr. Belz and Dr. Koprivica have placed on Mr. Wimberly as a result of his last accident and considering the very real impact of his diagnosed pain disorder I find that Mr. Wimberly is permanently and totally disabled as a result of the last accident alone.

After considering all the evidence, including the testimony at the hearing, Dr. Koprivica, Dr. Reintjes, Dr. Belz, Dr. Halfaker and Dr. Butts's deposition testimony, numerous medical records and records of Mr. England and Mr. Dreiling's deposition testimony and their vocational reports and other exhibits and after observing claimant's appearance and demeanor, I find and believe that claimant met his burden of proving that he is rendered permanently and totally disabled solely as a consequence of his work injury of June 10, 2009. Thus, he proved his employer's liability for permanent total disability benefits. His employer is ordered to provide such benefits to him and to continue to provide such benefits for so long as he remains so disabled.

START DATE FOR PERMANENT TOTAL DISABILITY

Mr. Wimberly has been unable to return to work since Dr. Reintjes released him from care on November 2, 2009. Western Fireproofing and its insurer are responsible for permanent total disability benefits commencing on November 2, 2009 for a total of 156 and 4/7 weeks resulting in \$120,956.13 in past due permanent total disability benefits through November 2, 2012 in addition to the stipulated Temporary Total Disability underpayment of \$6,088.25. All of the TTD benefits are three years past due as of November 2, 2012, therefore, the Employer/Insurer is ordered to pay an additional \$2,015.21 in interest pursuant to Section 287.160.3 RSMo. (2005) for a total of \$129,059.59 payable immediately. And \$772.53 per week, thereafter for the remainder of Mr. Wimberly's life.

UNPAID MEDICAL

I further find that Mr. Wimberly has had ongoing medical needs for pain management since being released at maximum medical improvement on November 2, 2009. I find that the Employer/Insurer failed to meet its obligations to provide medical treatment necessary to relieve the effects of Mr. Wimberly's injury as required under Section 287.140 RSMo. (2005) and that Mr. Wimberly incurred expenses of \$4,975.42 in relieving the effects of the injury. I therefore order the Employer/Insurer to reimburse Mr. Wimberly \$4,975.42 in unpaid medical expenses.

FUTURE MEDICAL BENEFITS

Dr. Koprivica concluded that Mr. Wimberly is in need of ongoing pain medication and possible future revision of his cervical fusion as a result of his work injury in June, 2009. The evidence supports his opinion. Thus, Mr. Wimberly proved that he is in need of ongoing medical treatment to cure and relieve him of the effects of his June, 2009 accident at work. Mr. Wimberly's employer is ordered to provide such treatment to him and to continue to provide such treatment to him for so long as he remains in need of it. The employer has the right to direct the medical treatment. See Section 287.140 RSMo. (2005).

Made by: _____

Emily S. Fowler
Administrative Law Judge
Division of Workers' Compensation