

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

Injury No.: 04-078553

Employee: Scott W. Zangraft  
Employer: MODOT  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: July 30, 2004  
Place and County of Accident: County of St. Louis, 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 June 27, 2007. The award and decision of Administrative Law Judge Edwin J. Kohner, issued June 27, 2007, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 6<sup>th</sup> day of December 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

          NOT SITTING            
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Scott W. Zangraft

Injury No.: 04-078553

Dependents: N/A  
Employer: MODOT  
Additional Party: Second Injury Fund  
Insurer: Self Insured  
Hearing Date: April 16, 2007

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

Checked by: EJK

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: July 30, 2004
5. State location where accident occurred or occupational disease was contracted: County of St. Louis, 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? Self Insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
The claimant injured his neck and shoulder while removing a rack from a large truck
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, shoulder, and low back
14. Nature and extent of any permanent disability: 35% permanent partial disability to the neck and 25% permanent partial disability to the low back
15. Compensation paid to-date for temporary disability: \$5,162.00
16. Value necessary medical aid paid to date by employer/insurer? \$80,703.20

Employee: Scott W. Zangraft Injury No.: 04-078553

17. Value necessary medical aid not furnished by employer/insurer? None to date.
18. Employee's average weekly wages: \$609.00
19. Weekly compensation rate: \$406.00/\$354.05
20. Method wages computation: By agreement

### COMPENSATION PAYABLE

21. Amount of compensation payable:

240 weeks of permanent partial disability from Employer

\$84,972.00

22. Second Injury Fund liability: No

TOTAL: \$84,972.00

23. Future requirements awarded: See Additional Findings of Fact and Rulings of Law

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 10% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Robert S. Flavin, Esq.

## FINDINGS OF FACT and RULINGS OF LAW:

|                   |                    |             |                                    |
|-------------------|--------------------|-------------|------------------------------------|
| Employee:         | Scott W. Zangraft  | Injury No.: | 04-078553                          |
| Dependents:       | N/A                |             | Before the                         |
| Employer:         | MODOT              |             | <b>Division of Workers'</b>        |
|                   |                    |             | <b>Compensation</b>                |
| Additional Party: | Second Injury Fund |             | Department of Labor and Industrial |
|                   |                    |             | Relations of Missouri              |
|                   |                    |             | Jefferson City, Missouri           |
| Insurer:          | Self Insured       | Checked by: | EJK                                |

This workers' compensation case raises several issues arising out of an alleged work related injury in which the claimant, an electrician, suffered a cervical spine disc injury while removing a rack from a heavy truck. The issues for determination are (1) Future medical care, (2) Permanent disability, and (3) Second Injury Fund liability. The evidence compels an award for the claimant for future medical care and permanent partial disability benefits.

At the hearing, the claimant testified in person and offered a deposition of David T. Volarich, D.O., and voluminous medical records. The defense offered depositions of David S. Raskas, M.D., and Bakul R. Dave, M.D. The Second Injury Fund offered records of a prior workers' compensation settlement.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri.

### SUMMARY OF FACTS

On July 30, 2004, the claimant and two co-workers lowered a rack attached to the front of a large truck with pins. When the claimant removed the last pin, the rack struck him in the shoulder and head. He "woke up" on the floor, several feet from the truck. Upon awakening, his head was bleeding from a cut, and he suffered from pain in his head. He went by ambulance to the DePaul Hospital emergency room.

Upon arriving at the emergency room, Mr. Zangraft complained of neck, head, and shoulder pain. X-rays of his neck revealed degenerative changes at C-5-6, and he was released with medication.

On August 2, 2004, he went to Barnes Care and gave a medical history that he had been injured when a three hundred fifty pound rack fell, hit him on the right shoulder and on top of his head, knocked him to the ground

and then back ten feet. He had a headache, neck pain, right shoulder pain, bilateral shoulder pins and needles. X-rays were essentially normal. Barnes Care wanted him to begin therapy. On August 9, 2004, he reported that his head was better but he still had pain in his neck and shoulders and had pain in his low back as well as his upper back. At this time, Barnes Care continued to recommend therapy. He went through several therapy visits with Barnes Care in August 2004 without improvement.

On September 8, 2004, the claimant reported to Dr. Raskas that he had left posterior buttock and left leg pain. The claimant reported that his pain had been worse in his neck and shoulders but his back deteriorated during therapy for the work related injury. The claimant testified that the therapist at Barnes Care tried to adjust his neck and caused the back pain to be much worse. The claimant underwent further therapy at from Dr. Raskas office and Dr. Hurford performed epidural injections at disc space L-5 S-1 on September 28, 2004, and October 21, 2004. However, the claimant continued to complain of back pain. On November 2, 2004, Dr. Raskas performed a laminotomy on a herniated disc at L-5 S-1, removing part of the lamina to provide relief from the pinched nerve and removing disc material. On November 9, 2004, Dr. Raskas performed a microdiscectomy at C-5 C-6 and C-6 C-7, a partial vertebrectomy and then fusion and plating. Dr. Raskas took a bone from the claimant's hip for fusing of the neck vertebrae.

After the surgery, the claimant had follow up visits, and Dr. Raskas released the claimant to light duty work on December 15, 2004. Dr. Raskas released the claimant to full duty work on February 16, 2005, and released the claimant from active treatment on May 23, 2005.

The claimant continued to complain of pain in his back and in his neck. He followed up for treatment with his personal family doctor, Dr. Parker, who sent him to Dr. Steven Smith for injections. On September 12, 2005, the claimant consulted Dr. Dave for constant neck and low back pain, which was worse with physical activity and prolonged sitting, standing, walking. The pain varied on a scale of four to nine on a scale of ten. Dr. Dave prescribed pain medication for the claimant from September 2005 and continuing through February 2007. On February 20, 2007, Dr. Dave testified that the claimant requires future medical care and treatment for the remainder of his life. The claimant testified that he has another appointment scheduled with Dr. Dave within the next few months.

Dr. Vic Glogovac diagnosed and treated the claimant for carpal tunnel of the right wrist in 1987.

The claimant testified that he suffers constant neck and low back pain. For a period of time after his work related injury, he returned to the job duties that he had been doing before the injury. However, he also testified that he frequently got assistance from other co-workers due to his neck and low back pain. In July 2006, he received a promotion to a supervisory position where he does much less physical labor and mainly works in an office. He also testified that the new position alleviates his daily neck and back pain.

The claimant also testified that he suffers from weakness, difficulty grasping things, and occasional pain in his right wrist. He testified that he makes accommodations for his right wrist and did so even before the 2004 accident. The claimant testified that he has difficulty reaching overhead due to the pain in his neck and upper back and lifting, bending and stooping, and using tools that vibrate. He limits his household activities due to the pain and limitations in his neck and back. He testified that he used to fish, play softball, bowl, and ride bicycles, but he no longer participates in any of those activities.

The claimant also complains of daily neck pain radiating into both shoulders. He suffers from daily headaches that last for several hours. Range of motion in his neck is limited when looking upward or downward. His difficulty with overhead work is considerable. He suffers from low back pain radiating into the right and left buttocks, bilateral hips, and from the left knee to the foot. If he stands on his feet for several minutes he experiences back and leg pain. Also, if he sits for more than one hour he experiences back and leg pain. He is able to bend but he has difficulty getting back up. Even rising from a seated chair position is difficult for him. He avoids impact activities such as running and jumping. He has numbness in three toes in his left foot and the longer he stands the worse it gets. Any type of strenuous activity causes the back pain to increase.

Dr. Volarich

Dr. Volarich examined the claimant on November 21, 2005, and opined that the work related incident caused the claimant's herniated discs in the claimant's neck and low back. See Dr. Volarich deposition, pages 5, 11. Dr. Volarich opined that the claimant sustained a permanent partial disability as a result of the work related incident of forty-five percent of the cervical spine, and thirty percent of the lumbar sacral spine. See Dr. Volarich deposition, pages 12, 13. He also opined that the claimant required future medical care and treatment. See Dr. Volarich deposition, page 14. He opined that the claimant has a fifteen percent permanent partial disability of the right wrist for the carpal tunnel problem and that the claimant's overall disability (combining the work related injuries and the prior carpal tunnel problem) is greater than the simple sum. See Dr. Volarich deposition, pages 13, 14. Dr. Volarich placed a number of restrictions upon the claimant including limiting repetitive bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks; not handling weight greater than thirty-five pounds and to limit that task to an occasional basis; not to handle weight over his head or away from his body or carrying it long distances; avoid remaining in a fixed position for any more than sixty minutes at a time, including both sitting and standing and changing positions frequently to maximum comfort. See Dr. Volarich deposition, page 15. With regard to his right hand, Dr. Volarich recommended that the claimant minimize repetitive gripping, pinching, squeezing, pushing, pulling, twisting, rotary motions and similar tasks; avoid using the right elbow or forearm or wrist or hand in an awkward or blind fashion; avoid impact and vibratory trauma to the hand and use appropriate braces, anti vibration gloves, support straps and other protective devices as needed; not handling any weights greater than three to five pounds with the right upper extremity alone particularly with the right arm extended away from the body; or not lifting more than fifteen to twenty pounds with the right arm. See Dr. Volarich deposition, page 15.

### FUTURE MEDICAL CARE

Section 287.140, RSMo. 2000, requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." Future medical care can be awarded even though claimant has reached maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996). It can be awarded even where permanent partial disability is determined. The employee must prove beyond speculation and by competent and substantial evidence that his or her work-related injury is in need of treatment. Williams v. A.B. Chance Co., 676 S.W.2d 1 (Mo. App. 1984). Conclusive evidence is not required. However, evidence which shows only a mere possibility of the need for future treatment will not support an award. It is sufficient if claimant shows by reasonable probability that he or she will need future medical treatment. Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997); Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996); Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823, 828 (Mo. App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Sifferman at 828.

The amount of the award for future medical expenses may be indefinite. Section 287.140.1; does not require that the medical evidence identify particular procedures or treatments to be performed or administered. Dean, supra at 604; Talley v. Runny Meade Estates, Ltd., 831 S.W.2d 692, 695 (Mo. App. 1992); Bradshaw v. Brown Shoe Co., 660 S.W.2d 390, 393-394 (Mo. App. 1983). The award may extend for the duration of an employee's life. P.M. v. Metromedia Steakhouses Co., Inc., 931 S.W.2d 846, 849 (Mo. App. 1996). The award may require the employer to provide future medical treatment which the claimant may require to relieve the effects of an injury or occupational disease. Polavarapu v. General Motors Corporation, 897 S.W.2d 63 (Mo. App. 1995). It is not necessary that such treatment has been prescribed or recommended as of the date of the hearing. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996). Where future medical care and treatment is awarded, such care and treatment "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. 1985); Talley v. Runny Meade Estates, Ltd., 831 S.W.2d 692, 694 (Mo. App. 1992). The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. Hall v. Spot Martin, 304 S.W.2d 844, 854-55 (Mo. 1957).

In this case, the evidence supports a finding that the claimant requires future medical treatment. The claimant continues to suffer from continuing pain and problems with his neck and back, all of which flow from the 2004 work related injury. Dr. Volarich opined that the claimant will need future medication and therapy. See Dr.

Volarich deposition, page 14. Dr. Dave testified that the claimant will need management through medication and possibly interventional management for the pain resulting from the accident. See Dr. Dave deposition, page 18. While Dr. Raskas did not see a need for further medical treatment, Dr. Raskas has not examined the claimant since May 2005 and was not aware of the claimant's continuing condition and the treatment received from Dr. Parker, Dr. Smith and Dr. Dave. Based on the weight of the forensic medical evidence, the claimant has met his burden of proof regarding his need for future medical care due to the work related incident. The claimant is awarded additional medication, therapy, and interventional management from a medical provider selected by the employer. If the employer fails to identify a medical provider and notify the claimant of same within sixty days of the date of this award, the employer will have waived the opportunity to select the medical provider, and the claimant will select the medical provider at the employer's expense.

### **PERMANENT DISABILITY**

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id. In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629.

Dr. Volarich opined that the claimant sustained a permanent partial disability from the work related injury of forty-five percent of the cervical spine and thirty percent of the lumbar spine. See Dr. Volarich deposition, page 12. Dr. Raskas opined that the claimant sustained permanent partial disability of ten percent of the cervical spine and ten percent of the lumbar spine with ten percent at each level pre-existing the work related incident. See Dr. Raskas deposition, pages 12, 13. Dr. Raskas released the claimant from care in May 2005 and did not offer any further treatment for the claimant. He had not examined the claimant since May 2005. On the other hand, the claimant has received continuing treatment for neck and low back pain and problems, which he has suffered as a result of his work related injuries. He has treated with Dr. Parker, Dr. Smith, and Dr. Dave since last seeing Dr. Raskas, and is continuing care with Dr. Dave.

Based on the entire record, the claimant suffered permanent partial disabilities of thirty-five percent of the cervical spine and twenty-five percent of the lumbar spine from the work-related accident.

### **SECOND INJURY FUND**

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).

2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

4. The extent of the overall permanent disability resulting from a combination of the two permanent

partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).

6. In cases arising after August 27, 1993, the extent of both the preexisting permanent partial disability and the subsequent compensable injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 1994; Leutzinger, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) The employer's liability is considered in isolation - "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability;" (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Based on the record, the claimant sustained work related permanent partial disabilities of thirty-five percent of the cervical spine and twenty-five percent of the low back from the work related accident. Before the 2004 work related accident, the claimant had been diagnosed with right wrist carpal tunnel; and he had ongoing complaints with his right wrist, including numbness, tingling, and weakness in his right dominant hand. Dr. Vic Glogovac diagnosed and conservatively treated the claimant for carpal tunnel syndrome of the right wrist in 1987. The claimant never had surgery to repair the condition. He testified that he sometimes had numbness and tingling before the 2004 accident, but he simply shook it off and continued with his job duties. The claimant testified that the symptoms relative to carpal tunnel syndrome had not increased from August 1986 to July 2004. In 2005, the claimant reported to Dr. Volarich that he had occasional hand pain and weakness before the July 2004 accident. See Dr. Volarich deposition, page 17. Dr. Volarich found that the grip strength in the right wrist seemed almost the same as in the left wrist. See Dr. Volarich deposition, page 17. Dr. Volarich opined that the claimant suffered from a fifteen percent preexisting permanent partial disability of the right hand. See Dr. Volarich deposition, pages 13, 14. The claimant settled a 1987 worker's compensation claim on the basis of a twelve and one-half percent permanent partial disability. See Exhibit I.

However, based on the claimant's testimony, the preexisting wrist condition was a twelve and one-half percent permanent partial disability and was not a hindrance or obstacle to employment or reemployment if the employee became unemployed. These findings are based largely on the claimant's testimony that the wrist condition did not present persistent symptoms and had no severe impact on employability before the July 2004 accident. Therefore, the claim against the Second Injury Fund is denied.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

EDWIN J. KOHNER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
*Lucas Boling*  
*Acting Director*  
*Division of Workers' Compensation*