

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

Injury No.: 00-175171

Employee: Danny Andrews
Employer: National Steel Erectors
Insurer: Reliance Insurance Company

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 February 14, 2011. The award and decision of Administrative Law Judge Edwin J. Kohner, issued February 14, 2011, 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 24th day of June 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Danny Andrews Injury No.: 00-175171
Dependents: N/A Before the
Employer: National Steel Erectors **Division of Workers'**
Compensation
Additional Party: N/A Department of Labor and Industrial
Relations of Missouri
Insurer: Reliance Insurance Company Jefferson City, Missouri
Hearing Date: January 24, 2011 Checked by: EJK/lsn

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 15, 2000
5. State location where accident occurred or occupational disease was contracted: Warren County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The claimant, a heavy equipment operator, suffered multiple fractures to his right hip and leg while unloading a 1700 pound spool of cable off a trailer.
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: Right hip, right leg
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to-date for temporary disability: \$78,680.47
16. Value necessary medical aid paid to date by employer/insurer: \$129,321.74

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$900.00
- 19. Weekly compensation rate: \$599.96/\$314.26
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Permanent total disability benefits of \$599.96 per week from Employer beginning March 25, 2003, for Claimant's lifetime

Indeterminate

- 22. Second Injury Fund liability: No

TOTAL:

Indeterminate

- 23. Future requirements awarded: None

Said payments to begin as of March 25, 2003, 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 L. Floyd, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Danny Andrews

Injury No.: 00-175171

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: National Steel Erectors

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

Additional Party: N/A

Insurer: Reliance Insurance Company

Checked by: EJK/lsn

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a heavy equipment operator, suffered multiple fractures to his right hip and leg while unloading a 1700 pound spool of cable off a trailer. The sole issue for determination was permanent disability. The evidence compels an award for the claimant for permanent total disability benefits.

At the hearing, the claimant testified in person and offered a deposition of James M. England, a medical report from Shawn L. Berkin, D.O., and various medical records. The defense offered a deposition of Lisa Cox and a medical report from C.B. Pettigrew, D.O.

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. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

On September 15, 2000, this 63 year old claimant was helping unload a 1600 to 1700 pound spool of cable from a truck and the spool rolled on claimant and crushed his right hip, right leg, and pelvis. The claimant was airlifted to St. Johns West Hospital, and then transferred to St. Louis University Hospital. The claimant went to St. Louis University Hospital, and placed in ICU because he was confused and having hallucinations. See England deposition, Exhibit F.

The claimant was diagnosed with multiple fractures, including right hip fracture of the acetabular superior and posterior wall, and introchanteric femur fracture, and left superior and inferior rami fracture of his pelvis. He was surgically treated with intramedullary rodding of his right femoral shaft and an open reduction and internal fixation of his intertrochantric fracture of

his right hip. The surgical report indicates the use of significant hardware, including a rod, multiple screws, plates, and wiring. See England deposition, Exhibit F.

On February 1, 2001, Dr. Dunitz performed a revision of intramedullary rodding with removal of existing hardware and insertion of new hardware with a larger rod, because the femur had not fused. See England deposition, Exhibits D, E. The second surgery resulted in a non-fusion. Although the medical providers considered a third surgery, the surgery was not performed due to risks imposed by the claimant's irregular heartbeat.

Since the September 2000 accidental injury, the claimant has not worked and testified that he has considerable limitations due to his hip and leg. He testified that walking, standing, and climbing steps increase hip and leg pain. Walking on uneven surfaces causes pain. He testified that his hip and leg experience numbness at times. He testified that he cannot stand for six hours per day. He testified that he does not lift anything heavy. The heaviest object he lifts is a bag of dog food, weighing up to forty pounds, and he does that very infrequently. He walks to his mailbox and back, and he walks the dog a couple of times per day for a very short distance. He gets no more than six hours of sleep per night. Before the injury, he would sleep eight to ten hours. He cannot climb stairs without pain and it wears him out. He can drive for two hours then he must stop to get out and move around. He cannot sit for prolonged periods of time. He experiences popping in his hip. He has trouble keeping his balance. He cannot squat. His pain ranges from a five to eight out of ten on a daily basis. Weather changes increases his symptoms. His right leg is three to four centimeters shorter than his left leg. He walks with a cane and has a pair of shoes with a lift, but the lift does not help with his limitations.

The claimant is a high school graduate who was employed from 1969 to 2000 as a heavy equipment operator for this employer. The claimant's prior employment was working for the Oklahoma Highway Department on a survey crew for three to four years, working for Aalco Construction for a few weeks and working in high school on a family farm. The claimant also held a few limited side jobs over the years, hauling hay, working at a filling station pumping gas and changing tires and doing labor work for his brothers flooring company. The claimant does not use a computer, the internet, or text on a phone. He testified that all his past employment has been labor related to operating heavy equipment. He has not looked for work after his injury.

The claimant was treated for a heart condition in the 1980's and was on medication for a year and a half. The medication was no longer prescribed when his cardiac reports improved. He has no restrictions related to his heart.

On October 23, 2003, the Social Security Administration prepared a functional assessment based on a review of a medical report by a medical consultant/evaluator, Dr. Kurella, which is not in evidence. This evaluation placed various exertional restrictions on the claimant: (1) lifting restrictions of twenty pounds occasionally, ten pounds frequently, and (2) sitting, standing, or walking six hours per day, (3) climbing, balancing, kneeling, and crawling frequently, and (4) stooping and crouching occasionally. See England deposition, Exhibit H.

Dr. Berkin

On November 5, 2008, Dr. Berkin reviewed the claimant's medical records, obtained a medical history from the claimant, and examined the claimant. Dr. Berkin reported complaints of right hip and leg tenderness, symptoms affected by cold temperatures, pain on a level of 4/10, difficulty walking, symptoms aggravated by climbing stairs. On exam, Dr. Berkin reported decreased range of motion of the right hip and leg, right leg was 4 cm shorter than left leg, tenderness on the lateral surface of the right thigh, positive Patricks'-Faber Test and pain when squatting. Dr. Berkin placed restrictions to avoid prolonged standing or walking, avoid climbing of ladders or standing above ground level, to be cautious climbing stairs and walking on uneven surfaces and if performing exertional activities he should pace himself and take frequent breaks to avoid exacerbation of symptoms of further injury.

Dr. Pettigrew

On December 7, 2009, Dr. Pettigrew examined the claimant and reviewed the claimant's medical history and complaints. He opined that the claimant suffered a 15% permanent partial disability of the body as a whole and a 15% permanent partial disability of the right leg for the non-union. See Exhibit 1, pages 4, 5. Dr. Pettigrew did not discuss restrictions. Dr. Pettigrew reported that the claimant experienced pain in his right hip and leg from walking, standing, sitting and squatting, numbness and tingling in his right hip when sitting, clicking and popping in his right hip, pain in his hip climbing one stair, pain in his right hip and right leg when walking on uneven ground, pain in his right hip and leg lifting over fifty pounds and pain in his right hip and leg are worse with weather changes. See Exhibit 1.

Lisa Cox

Lisa Cox, a certified rehabilitation counselor for 13 years, evaluated the claimant on December 8, 2009 and testified that the claimant could perform light to medium labor work based on the social security evaluation Functional Assessment Report, which indicated claimant could stand for 6 hours. See Cox deposition, pages 9, 10. She testified that the claimant could return to his prior occupation and would be a good candidate for on the job training or brief training but not formal training. See Cox deposition, pages 13, 14.

James England

James England, a certified rehabilitation counselor, licensed in Missouri as a professional counselor and certified by the U.S. Department of Labor, evaluated the claimant on October 28, 2009, and concluded that the claimant should be placed in the sedentary work level based on Dr. Berkin's restrictions to avoid prolonged standing and walking, avoid climbing ladders or standing above ground level and be cautious climbing stairs and walking on uneven surfaces and pace himself and to take frequent breaks. See England deposition, page 18, Exhibit H. Mr.

England testified that the social security evaluation of claimant's medical records placed claimant in the light work category. See England Deposition, page 17. Mr. England testified about the two competing sets of restrictions from Dr. Berkin and the Social Security Administration:

I am not in a position to say this one is right and that one is wrong. I mean, I just have to kind of look at it a way you know, from what I see. At the time I evaluated him, I had Dr. Berkin indicating that he shouldn't be on his feet for prolonged periods of time. That seemed to be in line with what the man told me that he couldn't be on his feet for prolonged periods of time. To me... and the fact that he was, you know 62 and walking with a cane, it certainly didn't look to me to be unusual that somebody that had that and then had a non-union of his leg would probably have difficulty being on his feet for long periods. That's why I concluded that in the end that based upon what the man told me and based upon what I saw in Dr. Berkin's report, that he probably would be better suited for sit down or more sedentary type activity, all things considered. See England deposition, pages 21, 22.

Mr. England testified that there was nothing in any of the medical that indicated that claimant could do medium level work. See England deposition, page 29. Mr. England testified that if the claimant could be on his feet most of the day then he would be more likely employable in some capacity, but, if cannot be on his feet most of the work day then he is not employable. See England deposition, page 32. Mr. England also testified that he does not believe that any employer would hire claimant over anyone else for an entry level job. See England deposition, page 27.

PERMANENT DISABILITY

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

"Total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id. In order for claimant to be awarded permanent total disability he has the burden of proving that no employer in the usual course of

business would reasonably be expected to employ claimant in his present physical condition.
Gassen V. Lienbengood, 134 S.W. 3d 75, 80 (Mo App. WD 2004)

The central focus of the forensic evidence was whether the claimant was employable in light work occupations or whether his limitations and restrictions combined with his age, education, and past relevant work history limit him to sedentary occupations. This is critical, because the claimant's age, education, and past relevant work history offer him no skills that are transferable to sedentary occupations. Based on the testimony of the vocational experts, the claimant's level of work is dependent on his ability to stand for a period of time. If the claimant can stand for over 6 hours per workday, then he would qualify for light level work. If the claimant is unable to stand for 6 hours per workday, then he only qualifies for a sedentary level of work.

Dr. Berkin opined that the claimant is restricted to standing for less than six hours and therefore, he should be restricted to sedentary work. In contrast, the Social Security evaluation contended that the claimant could stand for six hours per day and therefore be eligible for light work. In considering the credibility of the two forensic evaluations, the Social Security evaluation was based on a review of record of only one report from Dr. Kurella, and Dr. Kurella's report is not in evidence. Dr. Berkin's report was based upon records review, a history from claimant, and a physical exam. Given the additional foundation in Dr. Berkin's medical evaluation, his restrictions for the claimant would bear greater credibility.

The evidence compels a finding that the claimant sustained multiple fractures to his pelvis, right hip, and right femur, which required extensive hardware and resulted in a non-union of his femur. The totality of the evidence supports that claimant cannot stand for six hours per day, cannot lift more than twenty pounds occasionally, nor lift more than ten pounds frequently, thus placing him in the sedentary work level.

Since the claimant has no transferable job skills in the sedentary level of work and no employer in the usual course of business would reasonably be expected to employ the claimant in his present physical condition, the claimant is permanently and totally disabled. Since the claimant's permanent and total disability resulted from the limitations and restrictions from the 2000 accident at work combined with his advanced age, limited education, and lack of transferable job skills, the employer and its insurer bear liability for permanent and total disability benefits to the claimant.

Made by: /s/ EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 14th day of February, 2011.

/s/ NAOMI L. PEARSON
NAOMI L. PEARSON
Division of Workers' Compensation