

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

Injury No.: 08-013631

Employee: Romondo Battle
Employer: City of St. Louis (Settled)
Insurer: Cannon Cochran Management Services (Settled)
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 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 August 26, 2010. The award and decision of Administrative Law Judge Suzette Carlisle, issued August 26, 2010, 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 15th day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Romondo Battle

Injury No.: 08-013631

Dependents: N/A

Employer: City of St. Louis (Settled)

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

Additional : Second Injury Fund

Insurer: Cannon Cochran
Management Services (Settled)

Hearing Date: June 23, 2010

Checked by:SC

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: February 4, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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:
While putting out a fire Claimant injured his neck when he was hit on the head by a falling ceiling and a dresser.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Cervical spine
14. Nature and extent of any permanent disability: 37.5% (previously settled)
15. Compensation paid to-date for temporary disability: \$1,061.40
16. Value necessary medical aid paid to date by employer/insurer? \$100,280.25

Employee: Romondo Battle

Injury No.: 08-013631

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient for maximum benefit rates
- 19. Weekly compensation rate: \$389.04/\$389.04
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

150 weeks of permanent partial disability from Employer (previously settled) (\$58,356.00)

22. Second Injury Fund liability: Yes

49.5 weeks of permanent partial disability from Second Injury Fund \$7,761.35

TOTAL: \$7,761.35

23. Future requirements awarded: None

Said payments to begin 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% all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Stephen Thurman

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Romondo Battle

Injury No.: 08-013631

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: City of St. Louis (Settled)

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

Additional: Second Injury Fund

Insurer: Cannon Cochran.
Management Services (Settled)

STATEMENT OF THE CASE

Pursuant to Section 287.450 RSMo (2005)¹, a hearing was held on June 23, 2010 at the Division of Workers' Compensation (DWC) St. Louis office; at the request of Romondo Battle (Claimant) to determine if Claimant is entitled to receive permanent partial disability (PPD) from the Second Injury Fund (SIF). Attorney Stephen Thurmer represented Claimant. Assistant Attorney General Levander Smith, Jr. represented the SIF. The record closed after presentation of the evidence. Venue is proper and jurisdiction lies with the DWC.

The City of St. Louis (Employer) and Cannon Cochran Management Services (Insurer) settled their case with Claimant on December 2, 2009 for 37.5% of the cervical spine.

STIPULATIONS

The parties stipulated that on or about February 4, 2008:

1. Claimant was employed by Employer;²
2. Claimant sustained an accident which arose out of and in the course of employment in St. Louis, Missouri;
3. Employer and Claimant operated under the Missouri Workers' Compensation Law;
4. Employer's liability was fully insured;
5. A Claim for Compensation was timely filed;
6. Claimant's average weekly wage was sufficient for a maximum temporary total disability (TTD) rate, and permanent partial disability (PPD) rate of \$389.04;
7. Employer paid TTD benefits totaling \$1,061.40, and
8. Employer paid medical benefits totaling \$100,280.25

¹ All statutory references are to the 2005 Revised Statutes of Missouri unless otherwise stated.

² References in this award to the Employer also include the Insurer.

ISSUES

The sole issue for disposition is the nature and extent of SIF liability, if any, for PPD benefits.

SUMMARY OF THE DECISION

Based on the entire record, Claimant's testimony, demeanor, medical records, and the applicable law in the State of Missouri I find Claimant met his burden to show SIF is liable for PPD benefits.

FINDINGS OF FACT

All evidence was reviewed but only evidence supporting this award is discussed below:

1. Claimant successfully passed a physical examination before Employer hired him as a firefighter in 2005. The examination measured performance of the heart, lungs, blood pressure, vision, hearing, and endurance.
2. Claimant worked as a firefighter for Employer for three years. He climbed ladders and roof tops, lifted 200 pound fire hoses with and without assistance, carried an axe, cleaned the fire truck, and cooked at the firehouse.
3. Claimant received good ratings during yearly evaluations, and had no problems performing his job duties.
4. On February 4, 2008, while poking holes in a ceiling to extinguish a fire, the ceiling collapsed and fell on Claimant along with a dresser, and ruptured two cervical discs. Dr. Taylor replaced the discs from C5 to C7.
5. Claimant remained at home until July, 2008, when doctors released him to return to work light duty. While on light duty, he sat for three months at headquarters. Claimant retired from the force in November 2008.
6. Complaints include decreased range of motion, stiffness, left arm pain with certain movements, left arm weakness, difficulty sleeping, and occasional pain and tingling which radiates into the left arm. To relieve symptoms, Claimant takes Motrin and Ibuprofen.
7. Claimant and Employer settled the workers' compensation claim arising out of the accident for 37.5% PPD of the cervical spine.

Pre-Existing Injuries

8. In 1987 Claimant fractured his right wrist when he fell on it while playing baseball. No medical records are in evidence, but he received an arm cast and physical therapy. Complaints include popping, decreased range of motion, and grip strength. As a fireman, Claimant testified it was hard to hold a rope steady while pulling up a ladder. Claimant is right-handed.

9. Claimant served in the United States Marine Corp. from 1993 to 1998, and fractured the 2nd and 3rd metatarsals and fore foot of his right foot while training. No medical records are in evidence, but Claimant testified he wore a cast from his foot to his knee. As a fire fighter, the foot rolled when he climbed ladders. The foot is stiff when he walks and it occasionally pops and cramps when he lifts heavy objects or squats.
10. In 2005 Claimant sustained a right wrist injury. After treatment ended, he was returned to work without restrictions. He received no special accommodations. However, he wore a wrist brace to perform strenuous activities.
11. In November 2006 Claimant sustained a severe right ankle strain while climbing a fence to put out a fire at work. An MRI revealed injury to the anterior talofibular and calcaneal fibular ligaments, bone contusions to the medial malleolus and talus, and soft tissue swelling. **Chris Kostman, M.D.**, prescribed a brace, crutches, medication, physical therapy, no lifting over 40 pounds or ladder climbing.
12. Claimant missed work for a month, and returned to work light duty for three months before being released to full duty.³ Claimant wears an ankle brace for some activities. The physical therapist recommended a tight laced boot at work for additional support. Claimant settled the case with Employer for 10.2% PPD of the right ankle.
13. On December 3, 2007 Claimant reinjured his right ankle at work when it rolled on an uneven floor while he was putting out a house fire. Currently the right ankle rolls when he walks on uneven pavement, locks, and becomes painful. No medical records or compromise settlement are in evidence.
13. Claimant testified his right ankle, wrist, and foot cause a hindrance or obstacle to his employment or re-employment. Claimant has not worked since his retirement from the department. However he plans to seek employment as an aerospace mechanic based on his military training and experience.

Medical Evidence

14. Claimant treated for the primary work accident at **St. Louis University Emergency Department**. A CT scan dated February 4, 2008 revealed multi-level mild to moderate spinal canal stenosis due to a paracentral bulge. An MRI the same day, revealed spondylolysis at C5-6 and C6-7 with moderate canal narrowing.
15. The next day, **Concentra** diagnosed a cervical strain with radiculopathy, recommended medications, and prescribed physical therapy, restricted work, and referred him to a neurologist for urgent care.
16. On March 14, 2008, **David M. Peeples, M.D.**, found a nerve conduction study revealed no cervical radiculopathy. **John Graham, M.D.**, performed a C6-C-7 steroid injection on April 9, 2008. Dr. Peeples diagnosed a cervical strain superimposed on cervical

³ Claimant testified that Employer placed him on light duty status after the 2006 right ankle sprain, but he could not work so he stayed home.

spondylosis. On April 23, 2008, Dr. Peeples found Claimant had achieved maximum medical improvement (MMI) and referred him to a spine surgeon.

17. On May 21, 2008, a CT myelogram revealed a central disc bulge at C6-7 with disc osteophytes at C5-6 and neural impingement at C5-6 and C6-7. On June 2, 2008, after conservative treatment failed, **Brett Taylor, M.D.** performed a discectomy at C5-6 and C6-7 and replaced the discs. Following surgery, Dr. Taylor prescribed physical therapy and work hardening. Dr. Taylor released Claimant to return to work with restrictions on July 1, 2008.
18. A Functional Capacity Evaluation dated August 18, 2008 revealed Claimant can work in the Medium demand level overhead and the Heavy demand level to the shoulder, but firefighters are required to work at the Very Heavy demand level. Claimant completed the four hour test with “acceptable” effort.
19. On August 20, 2008, Dr. Taylor found Claimant had reached MMI and could work in the medium-heavy to heavy demand level, but recommended Claimant not return to work as a firefighter.

Expert Opinion Evidence

20. **David T. Volarich, M.D.**, a board certified independent medical examiner, examined Claimant at the request of his attorney on February 24, 2009. For the primary injury, Dr. Volarich diagnosed disc herniations at C5-6 and C6-7.
21. Dr. Volarich opined the dresser hitting Claimant was the “substantial contributing factor, as well as prevailing or primary factor” that caused the cervical disc herniations and need for both disc replacements. Dr. Volarich rated 45% PPD of the cervical spine for the work accident, and did not recommend additional surgery.
22. Dr. Volarich imposed the following spinal restrictions: limit repetitive bending, twisting, lifting, pushing, pulling, carrying, and climbing, occasional lifting over 35 pounds, no weight overhead or away from the body, and avoid fixed positions for more than 60 minutes.
23. Pre-existing diagnoses include a right distal radius fracture, right index finger fracture-asymptomatic, right ankle fracture, and right ankle strain with ligament tears. For preexisting disability, Dr. Volarich rated 15% PPD of the right wrist and 25% PPD of the right ankle. Restrictions include limited repetitive stooping, squatting, crawling, kneeling, pivoting, and climbing, use of caution on uneven terrain, and weight bearing to tolerance.
24. Dr. Volarich found the primary injury and preexisting disability were a hindrance to Claimant’s employment or re-employment. Furthermore, the combined disabilities create greater disability than the simple sum or total of each separate injury and a loading factor should be added. Dr. Volarich reviewed no medical records for right wrist injuries in 1987 or the right ankle injuries in 1993.

RULINGS OF LAW

A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. 2008). In order for a claimant to recover against the SIF, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1 RSMo.

A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. 2008) (*Citations omitted*).

In order for a claimant to be entitled to recover permanent partial disability benefits from the SIF, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004).

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find Claimant has established a right to recover the following from the SIF:

1. Claimant sustained a compensable last injury which resulted in permanent partial disability of 37.5% of the cervical spine (150 weeks).
2. At the time the last injury was sustained, Claimant had the following preexisting permanent partial disabilities, which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:
 - a. 15% of the right wrist (26.25 weeks).
 - b. 15% of the right ankle (23.25 weeks).Total weeks for preexisting disabilities: 49.5 weeks
3. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes (10%) greater overall disability than the independent sum of the disabilities. The SIF liability is calculated as follows: 150 weeks for last injury + 49.5 weeks for preexisting injuries = 199.5 weeks x (10) % = 19.95 weeks of overall greater disability.

CONCLUSION

The Second Injury Fund is liable to Claimant for \$7,761.35 in permanent partial disability benefits. Attorney for Claimant shall be entitled to an attorney fee of 25% of this award.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation